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MONTANA CONSTITUTIONAL CONVENTION

1971-1972

EDUCATION

By Bruce Sievers

CONSTITUTIONAL CONVENTION STUDY NO. 17

PREPARED BY

MONTANA CONSTITUTIONAL CONVENTION COMMISSION

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PREFACE

The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention. This series of reports by the Commission is in fulfillment of that responsibility.

This study on local government in Montana was written by Bruce R. Sievers, research analyst on the Commission staff. The Commission has authorized publication of the report as approved by the Research Subcommittee on Education consisting of Commission members Mrs. Firman H. Brown, Missoula; Charles L. Harrington, Butte; Bruce R. Toole, Billings, and Dr. Ellis Waldron, Missoula. The report concerns not only present constitutional provisions on education in Montana and other states, but also questions of general educational rights and responsibilities.

The Commission extends its appreciation to local and state officials who cooperated in the preparation of the study. This report is respectfully submitted to the people of Montana and their delegates to the 1971-1972 Constitutional Convention.

ALEXANDER BLEWETT

CHAIRMAN

Our wisdom consists of servile prejudices; our customs are nothing but subjection, restriction, constraint. Civilized man is born, lives, dies in slavery: at his birth he is bound in swaddling clothes, at his death nailed in a coffin; and, all the time he has worn the image of man, he has been held no less fast by our institutions.

Jean-Jacques Rousseau
Émile

I see the facilitation of learning as the aim of education, the way in which we might develop the learning of man, the way in which we can learn to live as individuals in process. I see the facilitation of learning as the function which may hold constructive, tentative, changing, process answers to some of the deepest perplexities which beset man today.

Carl R. Rogers

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SUMMARY

CHAPTER I

EDUCATION AS A CONSTITUTIONAL ISSUE--BACKGROUND

The first questions to face constitution-writers in the field of education are whether educational provisions are essential to a constitution, and, if so, how extensive they should be. This study examines constitutional issues in education, first in terms of the broad questions of goals, rights, obligations, freedoms, powers and equality, and then in terms of the specifics of administration and financing. Structural specifics can be more easily determined once the general questions have been answered.

The American educational system evolved out of a disparate assortment of religious, private and public schools into a unique system of primarily public education which stressed the characteristics of local control, freedom from cost and universality. As a function left almost exclusively to the states, education takes its particular character from the state in which it exists. Montana education grew up on the basis of the widely scattered local school. Gradually the state assumed a greater burden of support and a greater degree of control of local education until today education is the largest single area of state governmental activity.

The century of educational development in Montana has brought it to the point where the early aims of providing a free and equal basic education for all can be achieved. However, once their goals of quality and equity are attained new problems will remain, arising from the conditions in which modern men exist. How the legal structure can provide for an educational system to adequately prepare people for the demands of contemporary society remains the central question of public policy in the field of education.

CHAPTER II

THE CHANGING CHARACTER OF EDUCATION

What constitutes an education? Changes in society and in human goals and aspirations bring about changes in men's notions of education. Critics of contemporary educational systems focus upon a revitalization of a long-valued American goal in education--education for the full development of the individual rather than for the most efficient work force. Technology and the bureaucratic society threaten to make education a cog in a great social machine, by causing schools to adapt to the exigencies of modern life. This, in turn, creates problems for society, for any institution with such a profound influence on the formative states of growth will have a determining effect on the quality of both public and private life. A society's educational system is so interwoven in the social fabric that it becomes both a cause and a symptom of the condition of society as a whole.

Proposed remedies are as many and varied as the sources from which they come. But almost all share one recommendation--that the public re-examine its educational system in light of its own deeply held values and re-establish a conscious guidance of the system on this basis. What this may mean in practical terms is not simply experimentation with new techniques in the school system but a whole rethinking of educational forms and practices. Constitutional provisions depend on what their authors forsee as the future of education.

CHAPTER III

EDUCATION AS A RIGHT AND AN OBLIGATION

The basic question of a right to an education has two sides: the right to receive an education and the right not to be educated. Courts have stressed the former and generally have enunciated a doctrine that there does exist a basic right to an education. The latter right remains the subject of active dispute. The courts generally have struck a balance between the right of the parent and the right of the state to educate, although a famous U.S. Supreme Court case (Pierce v. the Society of Sisters) and several recent cases dealing with Amish children suggest a new consideration of parents' and childrens' rights to protect themselves from potential state domination.

CHAPTER IV

EQUAL EDUCATIONAL OPPORTUNITY

Beyond the question of the right to an education lies the question of the equality of that right. The evolution of the "new equal protection" doctrine under the Fourteenth Amendment has placed increasing emphasis on the right to equal educational opportunity.

Substantial inequalities have been shown to exist in the American educational system. Courts have begun to assess critically these conditions and have gradually developed the doctrine that education falls under the new equal protection doctrine. The doctrine holds essentially that a "suspect" classification (such as race or wealth) cannot be used by the state to impair a "fundamental right" (such as the equal right to an education) absent a compelling state interest to do so. Under this test, the noted Serrano decision determined that the present financing system for California schools was unconstitutional. What this means in terms of alternative financing programs appears also to apply to Montana but the long range results remain to be worked out in practice.

The second half of the chapter concerns Indian education. Studies show that Indians not only suffer great inequities in educational opportunity and therefore ought to come under the scope of the equal protection doctrine, but also that they have particular needs arising from their existence as a unique cultural group. Indian education has been widely assessed as a national failure, whether in the form of federal boarding schools or state public schools. Those who advocate reform suggest both that greater support be given to Indian education and that the right to a substantial degree of cultural autonomy be recognized and encouraged. Experiments in schools oriented to Indian cultural integrity have proven extremely successful. A possible constitutional provision in this area could provide for the right to Indian cultural autonomy in education.

CHAPTER V

PUBLIC AND NONPUBLIC EDUCATION

Two separate issues are involved in the question of public and nonpublic education: the relationship between private education and state education and the relationship between religion and the state. The two often are confused, and it is important that they be distinguished in constitutional arguments. The former has to do primarily with the question of regulation and support of educational endeavors outside the public school system; it centers around the controversy between a strong public school system and educational diversity. On the other hand, the latter concerns the ambiguous relationship between church and state and focuses on the balancing of principles of nonestablishment and the free exercise of religion.

This chapter concentrates on the question of church-related education, because the primary constitutional questions have to do with this issue and because a large body of legal theory stands behind contemporary discussions. The U.S. Supreme Court has moved away from the relatively doctrinaire position articulated in the *Everson* decision and towards the more pragmatic approach embodied in the recent *Lemon* and *Tilton* decisions. In general, the Court has accepted certain forms of state aid to students in nonpublic, church-related institutions (transportation, released time, tax exemption, and textbooks) on the principle that the aid primarily benefited the child and only indirectly assisted the institution. The Court's present emphasis is on the factors of state neutrality toward and nonentanglement with religion.

The constitutional provisions of other states on this issue vary greatly, from very restrictive to the absence of restrictions. Montana's Article XI, Section 8 is among the more stringent ones. Constitutional questions with respect to both religious and nonreligious nonpublic education are primarily focused on Article V, Section 35 and Article XI, Section 8 of the present Constitution.

CHAPTER VI

DISTRIBUTION OF POWERS

The governing authority over education is distributed throughout all levels of government. Although the state has the primary responsibility for education, local boards and federal agencies also exercise substantial control over the educational system. American education began with locally controlled schools and only later developed more centralized powers and duties. Present trends are toward greater state and federal responsibility. The Montana system is balanced, with a slightly greater emphasis on local control than in many other states.

The principle constitutional issue in this area is that of centralization versus decentralization. Arguments in favor of greater efficiency and equality stress the importance of the centralization of authority, while arguments emphasizing local control and public involvement urge decentralization.

SUMMARY

CHAPTER VII

HIGHER EDUCATION

Higher education occupies a distinctly separate position in the educational system. The structures and functions of higher education have developed in a way fundamentally different from those of primary and secondary schools. Contemporary debate about the underlying purpose of higher education focuses on whether it is to be seen primarily as a "service" unit in society or as a flexible and far-sighted adviser.

This debate becomes translated in some degree into questions regarding the structure and governance of higher education. A majority of states either constitutionally establish state institutions of higher education or mandate the legislature to do so; twenty-one states establish a separate governing board for higher education. The duties and responsibilities of these boards vary from state to state. Possible alternatives in providing a governing board for higher education are discussed in this chapter, as are other studies of the Montana situation.

CHAPTER VIII

THE STRUCTURE OF EDUCATIONAL ADMINISTRATION

The specific issues in the structure of education which pose constitutional questions are those of the state board or boards of education, the superintendent of public instruction and the county superintendent of schools. Decisions must be made as to whether there shall be one or two (or more) boards, how board members should be chosen, and what the board's relationship to the superintendent should be. The present Montana Constitution is ambiguous on these points. There is some trend among other states toward an elected board.

The superintendent of public instruction is one of several presently elected officials whose position depends to some degree on the larger structure of the executive arm of government. Some states see the superintendent as the chief policymaker in education, receiving only advice from a board; others view the position as an administrator subordinate to the board. The position of superintendent thus varies according to its relationship to the board; the elective or appointive status of the superintendent corresponds to this relationship. The present Montana Constitution leaves the relationship between the board and the superintendent in a rather vague state.

Local school government often is not dealt with in state constitutions. Some states do mention local boards and/or school superintendents in their constitutions. Montana's present constitution provides for the county school superintendent along with other county officers. Some argue for increased administrative flexibility gained by the removal of constitutional mention of such officials; others argue that the county superintendent serves a valuable function and should remain in the constitution.

CHAPTER IX

FINANCING EDUCATION

Most of the issues in the field of educational financing are of a statutory rather than a constitutional nature. However, constitutional provisions should take into account possible developments in educational financing which require broad constitutional authorization. Recent court decisions in the area of equal educational opportunity have a particular bearing on constitutional provisions for educational support.

Education can be viewed as an economic investment as well as a vital social process. Support nationally has been strong, but it could be improved, with a potential result of greater cultural and economic returns. Although the school finance system is still heavily tied to the local property tax, this may change radically as a result of Serrano and other recent court cases. If the system does tend to become a state operated one, a wide variety of alternative financing programs become available.

Montana ranks high presently in overall tax effort in education, but low in the percentage of school support provided by the state vis-a-vis the locality. Montana also has disparities in its educational financing system equal to or greater than those in other states whose systems have been constitutionally challenged. Some constitutional changes would be necessary if Montana were to reorganize its educational taxing and distribution mechanisms.

CHAPTER I

EDUCATION AS A CONSTITUTIONAL ISSUE -- BACKGROUND

Constitutional revision in the field of education begins with the question: Does education belong in a constitution at all? The answer is not inevitably "yes," because education, as a substantive area, is not inseparably part of a governmental framework. If the answer is "no," however, this study will have completed its work in the first paragraph, and the reader need go no further.

If one assumes that education is a legitimate constitutional issue, then a wide variety of existing and possible state constitutional provisions on education present themselves for consideration. Every state has at least a minimal provision for education in its constitution. The reasons are not hard to find. Education is probably the single most important function for which states are given primary responsibility. This "fourth arm" of state government, as it has been called, exerts a uniquely pervasive influence on the life of every individual and on society as a whole. To it falls the prime responsibility for preservation and advancement of knowledge, development of culture and preparation of the citizen for self-government. Thomas Jefferson considered education the foundation of the democratic state.

In the modern era, educational functions have, if anything, gained in importance, but so have the corresponding strains and pressures on the educational system. States, in attempting to meet contemporary needs, have had to re-examine their fundamental authority in education and to reconsider the basic framework within which education is administered in their respective jurisdictions. Questions about constitutional revision are central to this process of reassessment.

The importance accorded education in state and local government is seen by the fact that more than one-third of all expenditures and more than one-half of all government staffing at the state and local level in the United States is devoted to education. In 1970, state and local governments spent an estimated $44 billion for education.[1] In Montana, more than one-quarter of the 1971-73 state budget is allotted to education, by far the largest share devoted to any one purpose. Educational institutions are to receive almost one-half of current state building program appropriations.[2]

How this largest sector of domestic governmental activity is to be publicly authorized and controlled has traditionally proven to be a question central to the structure and operation of the state. In addition to this fundamental issue, new questions arise when one considers afresh at the constitutional level the relationship between the state and modern education. What form will education take in the future? What should be public goals in education? What means should be used to attain them? How should the state be involved in education?

This study is organized around these questions in the following format: Part I deals with the character, powers and responsibilities of an educational system; Part II deals with the administrative structure--existing and potential--of the state educational organization; and Part III considers the financing of education. Taken in this sequence--goals, administrative means, financial means--the three make up the core of the educational problem as it presents itself for constitutional consideration.

HISTORICAL PERSPECTIVE

The scattered schools which made up the educational system of post-revolutionary America were a motley collection of religious, private and public institutions attended by a tiny portion of the school age population. Education was largely a privilege of wealth and status; the few public schools which did exist had to struggle with private academies for public support. Indeed, it was not until fifty years after Jefferson's death that his ideal of free public education approached realization in the state educational systems, and then it was for reasons very different than those Jefferson had envisaged.

The unique American system of public education which was to evolve in the nineteenth century from the plans of Jefferson and other educational theorists had even earlier origins. Its roots lay in both European experiments in universal education and in the isolated colonial schools of pre-revolutionary America. By 1716 Prussia already had departed from the traditional elitist concept of education and had introduced a system of free elementary schools. This system was expanded and permanently established by Frederick the Great in 1768. Still earlier, Calvinists in Scotland, following the sixteenth century plans of John Knox for the spread of religious learning, had designed a system of free universal primary and selective higher education and had in part implemented it by the first half of the eighteenth century. These examples were available to early American advocates of educational reform and are known to have influenced them.[3] Although these experiments were radical departures from the previous form of highly restricted European systems, they still adhered unquestioningly to a cardinal principle of all traditional educational systems: centralized control by church or state.

The American colonies, on the other hand, witnessed the ad hoc growth of a wide variety of educational institutions. Meeting indigenous needs of the scattered colonial settlements, a multiplicity of religious, private and public schools emerged with the novel characteristic of local control. Although this departure from traditional organizational dogma emerged more from circumstance than from theoretical intent, it rapidly evolved into a new and fundamental principle of American education. By the time of the framing of the federal Constitution, the principle of local control of education had become a firmly established doctrine.

It was primarily a combination of these two essentially new ideas--free education for all and local control--which determined the character of the emergent American educational system. These were, in effect, the educational counterparts of two cardinal principles on which the new nation was founded: equality and democracy. The federal Constitution embodied the general principles in the governmental framework, and at the same time set the terms for their application to the educational field. This accounts for the peculiar relationship between the federal Constitution and education: omission from the Constitution of any direct mention of education and at the same time reservation to the states of authority over areas of public concern not mentioned in the Constitution, i.e., education among others. Thus, while the federal government assumed general responsibility for guaranteeing equality of treatment under the law, which applied in education as in other areas, control was purposely left in the hands of state and local governments.

The intent by the framers to leave education to the almost exclusive responsibility of the states is evident both in their deliberations and in the "residual powers" clause in the Tenth Amendment. According to the chronicles, only rare and limited references were made to education in the Constitutional Convention, and what suggestions there were made--for instance, the establishment of a national university or the encouragement of the arts and sciences--were rejected.

With respect to the "general welfare" clause, which subsequently has been used as a source of federal responsibility in education, James Madison noted that it was not the original intent of the framers to sanction through this device the exercise of any broad powers by Congress. Rather, he said, the phrase containing the "general welfare" wording was an innocuous one, borrowed from the Articles of Confederation for the settlement of war debts:

> The result of this investigation is, that the terms "common defence and general welfare" owed their induction into the text of the Constitution to their connexion in the "Articles of Confederation," from which they were copied, with the debts contracted by the old Congress, and to be provided for by the New Congress; and are used in the one instrument as in the other, as general terms, limited and explained by the particular clauses subjoined to the clause containing them; that in this light they were viewed by the State Conventions which ratified the Constitution, as is shown by the records of their proceedings; and that such was the case also in the first Congress under the Constitution, according to the evidence of their journals, when digesting the amendments afterward made to the Constitution.[4]

Moreover, the Tenth Amendment clearly establishes that all powers not specifically given to the federal government are reserved for the states or to the people. This has set the pattern for the assumption by the states of almost sole authority in the field of education. The U.S. Supreme Court has held:

> The education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of the rights secured by the supreme law of the land.[5]

In disputes between states and localities over jurisdiction in educational matters, the courts have also consistently upheld the superior authority of the state. A landmark decision in this area was Springfield v. Quick in which the U. S. Supreme Court upheld the right of the State of Indiana to distribute school funds as it saw fit, contrary to the desires of a township.[6] In another case, the Supreme Court of Minnesota stated:

> This court so frequently has affirmed the doctrine that the maintenance of the public school is a matter of state and not local concern that it is unnecessary further to review the authorities at this date.[7]

The Tennessee High Court determined that:

> The exercise of the taxing power to promote a system of public schools for all of the counties does not infringe upon the right of local self government, because a public school system, like a highway system, a penal system, or a matter of public health is not purely local, but of state concern. The state is a unit, and the legislature is the state source of legislative power, from which flows the mandate of the state.[8]

Other provisions of the federal Constitution also have determined the role of the state in education; these will be taken up in a later chapter.

The principles written into the federal and state constitutions set the scene for future development of the American educational system. States and, by explicit delegation, localities assumed the responsibilities for providing a system of free public education for their citizens. These legal developments accompanied and, in part, reflected processes of social transition which were occurring in nineteenth century America. A vast influx of migration from Europe, increasing urbanization and rapid industrialization combined to create strong pressures for universal schooling as a means of upward mobility. Education remained a state and local concern,but during this period there developed increasingly favorable attitudes for a system of truly free public schools, although tempered by continued reluctance to provide tax monies to run them. The result was competition among a strange assortment of public, private and religious schools. Out of this, in the latter half of the nineteenth century, emerged the free publicly supported elementary school as it exists today.

The scene of conflict next became the public secondary school. Tradition had supplied only the example of the private academy, which provided college preparation for the children of the wealthy and a very few selected students from poor families. Gradually, the demand arose for the extension of the public education concept to secondary education, and by the end of the nineteenth century, after another long battle to overcome public unwillingness to tax itself for schools, the system of universal education through the high school level had established itself firmly. The crucial court decision which settled the legal issue was the Kalamazoo case. In defending the right of the state to provide at public expense such schooling as it determined necessary, Justice Cooley of the Michigan Supreme Court stated that:

> [W]e must confess to no little surprise that the legislation and policy of our state were appealed

> to against the right of the state to furnish a liberal education to the youth of the state in schools brought within the reach of all classes. . . . We content ourselves with the statement that neither in our state policy, in our constitution, or in our laws, do we find the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or the grade of instruction that may be given, if their voters consent in regular form to bear the expense and raise the taxes for the purpose.[9]

Although still only a relatively small percentage of children were in public high schools by the early twentieth century, the present century was to witness the realization of state support for free public schooling through the secondary level.

Although the ultimate goal of universal education through high school has never been reached (the rate of high school completion ranges from 50 percent to 90 percent among the states),[10] the focal point of educational change and controversy has shifted in most recent years to other areas of modern concern such as higher education, vocational schools, adult education, experimental teaching and learning methods, and the quality and equality of contemporary schools. Major changes in the social and economic structure of the nation have subjected the local educational systems to new pressures and have created new relationships among local, state, federal and private organizations involved in education. The technological society is placing previously unknown strains on the local school system, which evolved out of the needs and ideals of eighteenth century America.

Development in Montana

The history of education in Montana reflects the national developments. The inauspicious beginnings of the Montana school system are found in the scattered religious schools founded by Jesuit fathers and private schools served by itinerant teachers in the pre-territorial days. With the establishment of the Territory,[11] Governor Edgerton asked the first legislature for legislation to provide a common school system which would make the Territory eligible for possible federal grants. In January 1865, the legislature passed the act "establishing a common school system for the Territory of Montana."[12] This provided the legal basis for the delegation of authority and responsibility to local districts for the creation of a system of locally run free public schools.

EDUCATION AS A CONSTITUTIONAL ISSUE -- BACKGROUND

What had taken half a century to establish in principle for the nation--the duty of the state to provide a free public education for all--was written into the original statutes of the Montana Territory. The call to make this ideal a reality was voiced by the Montana Post:

> In every inhabited spot, let schools be erected. Humble and deficient in many respects they must be, at first, but in a marvellously short time, if the endeavors of the mothers and fathers of Montana are persistent and well directed, a school system shall arise in our midst, worthy of our name and station, and the riches our children will inherit will fall into hands fitted to receive them, and to apply them intelligently for their good and the welfare of the lands of their birth.[13]

The emphasis in this period was clearly on the local level; the territorial superintendent of public instruction, made appointive by the 1872 school law,[14] served primarily as a collector of information and link of communication between the governor and the local boards. The county superintendents also had only secondary functions as school administrators because they were county treasurers acting in ex officio capacity in education.

The devolution of authority to the local level reached an extreme in the authorization of groups as small as five families to create new school districts. This power, while meeting the needs of widely dispersed families, inevitably led to the vast multiplication of poor small districts with few students. This has become a major source of difficulty in Montana education, foreshadowing the continuing dilemma in providing efficient schools to a widely scattered population.

This dilemma became a central preoccupation of the territorial school superintendents and provided the main reason for the increasing importance as administrators. One of the strongest figures in early Montana educational history, Superintendent Hedges, was the first to assert the leadership of the superintendency in directing the territory's educational policy. He called for a more coherent and efficient educational system supported by higher standards for teachers, school houses, textbooks, curricula and for the general requirement of compulsory education. To accomplish this he also recognized the need for higher tax support:

> Our population is too scattered; our school houses

> deficient in accommodation, rare, and widely separated; school terms too short, and teachers deficient in qualifications. . . . We must have more means from some source to sustain longer terms of schools. If we can by no means obtain help from the National Government, if we must be left, in the days of our poverty and struggles to subdue a wilderness, to depend only on ourselves, I hope our people will awake to the hard necessity, and be willing to bear even greater burdens of taxation to serve the first necessity of any community--education for its youth.[15]

Hedges set the tone for future superintendents in efforts to improve Montana's educational system through advocating higher state standards, more efficient schools and increased financial support.

Hedges also was instrumental in the creation of the first bonding authorization in Montana for school construction. A later superintendent, Clark Wright, objected to the use of school funds for tiny districts:

> During the past year school was taught containing only two scholars, and owing to a previous contract with the Trustees of the District, the teacher drew pay from the school fund, refusing to relinquish the school. The law at present [1878] allows the establishment of a school on the petition of five families, but does not designate the number of scholars requisite to entitle the teacher to a share in the school fund.[16]

Wright's successor, W. Egbert Smith, also complained publicly that sparsely settled districts, short terms and small but costly schools unnecessarily hampered educational quality in the territory.[17]

The efforts of the territorial superintendents to overcome the inadequacies of the fragmented and expensive system which grew up in territorial Montana ultimately enhanced their position and led, with the arrival of statehood in 1889, to the establishment of the state superintendent of public instruction as an elective rather than appointive post. The Montana Constitution of 1889 also recognized the increased state role in supporting free public education by specifying guaranteed state financial assistance to the public schools and to a university.[18] The achievement of a complete and creditable educational system thus was recognized fully as a primary goal of state government, and the new state constitution embodied the necessary organizational and financial provisions for the attainment of this goal.

The newly established state directions and support of the Montana educational system facilitated its adaptation to rapid growth during the last years of the nineteenth and early part of the twentieth century. The number of students enrolled in public and private schools jumped from 11,857 in 1889, the first year of statehood, to 20,787 in 1891. By 1910 that number had quadrupled to 85,126 and it nearly doubled to 147,374 in 1916.[19] In the face of this explosion of the school population in these early years of statehood, the state did remarkably well in maintaining standards of quality, particularly in non-rural areas. The celebrated "Ayres Report," a national study of state school systems which appeared in 1919, ranked Montana first in the nation in terms of five basic financial indicators of educational support. This report had an unexpectedly adverse effect, however, in that it painted an overly optimistic picture of Montana education, ignoring the plight of the rural schools. As one study notes:

> The Ayres survey revealed that Montana ranked first of all the states when five financial components were averaged. Montana citizens felt jubilant about the state's educational showing, and the Ayres report was widely quoted. The survey failed, however, to account for such factors as schoolchildren with no opportunity to attend school, retardation, educational requirements for teachers, supervision, or methods of raising or distributing school funds. Moreover, in 1924, 46 percent of Montana schoolchildren were enrolled in rural districts (districts with a population of less than 1,000), which were commonly the poorer districts. For example, one Montana county had, in terms of wealth behind each teacher, a district with a figure of $225,000 and a second district with less than $25,000).[20]

The complacency which resulted from the Ayres report was shattered just a few years later--in 1926--when another comparative study based on the same indicators showed that Montana had fallen to thirteenth place.[21] The realization of the inequities in the existing school system caused by radical disparities in financial support led the legislature to pass a bill establishing the state equalization fund to right the imbalances. State Superintendent Trumper noted in her 1928 report:

> The establishment of a state equalization fund,

> even though it is not large, and even though it is derived from funds previously distributed to all of the schools of the state, has definitely provided for the past two years for more uniformity in school support than Montana has ever previously had.[22]

The equalization fund was successful in bringing rural schools more into line with the state's norm; however, the financial situation of the schools as a whole began to deteriorate during the 1920s, causing a reduction in some programs and an inability to meet increasingly higher state standards for teachers and curriculum. The depression provided the final blow from which the school system did not recover until after World War II.

In Montana, as in the nation as a whole, the Second World War created a disruption of the educational system. In addition to a scarcity of teachers and resources, society as a whole was beginning to undergo a dramatic transformation as a result of increased population mobility, the revolution in technology and changes in the economic structure. The need to provide education for new groups of the population, including veterans, the disadvantaged, younger children and adults, and for new social and vocational purposes required the educational establishment to adopt new patterns of thinking and to seek new resources. State aid to public schools jumped from $1,647,427 in 1941 to $7,265,609 in 1949-50.[23] And even this was but a beginning in meeting the long frustrated needs in areas of school construction, teachers' salaries and curriculum improvement. It was only with the substantial injection of state, and later of federal funds that the state began to make major headway in overcoming deficiencies and responding to new challenges in the educational system.

The primary vehicle of this new financial assistance in Montana was the "School Foundation Program," created in 1949 by the legislature. The passage of the act creating the Foundation Program was a major advance in rectifying existing inequalities in the school system. The program was effective in eliminating some of the gross differences between wealthier and poorer school districts and in increasing overall state aid to public schools. State equalization monies grew from $5,382,000 in 1949-50 to approximately $33,480,000 in 1969-70.[24] Further refinements in the Foundation Program were made in 1963 and 1969 in order to eliminate other inequalities. However, Montana still has difficulty in providing sufficient state funds for its schools, as shown by the fact that Montana ranks thirty-ninth among the states in percent of state support provided for all current operating expenses. Montana state funds provided 27.6 percent of operating costs in 1968-69, compared with a 39.9 percent national average.[25]

The century of educational development in Montana has brought it to the point where the early aims of providing a free and equal basic education for all can be achieved. Once the goals of quality and equity have been attained, however, there will be new problems arising from the conditions in which modern men exist. How the legal structure can provide for an educational system which will adequately prepare people for the demands of contemporary society remains the central question of public policy in the field of education.

CHAPTER I

NOTES

1. Arthur F. Corey, "The Essentials of a Modern School Finance Program," Partnership in School Finance (Washington, D.C.: National Education Association, 1966), p. 21.

2. Montana, Budget Bureau, Department of Administration, Legislative Summary: Report of Appropriations (Helena, 1971), pp. 9, 11, 13-18.

3. James B. Conat, Thomas Jefferson and the Development of American Education (Berkeley: University of California Press:, 1962), pp. 16-19, 37-39; cited hereafter as Conant, Jefferson; and Donald J. Leu, Elementary and Secondary Education and the Michigan Constitution (Lansing: Constitutional Preparatory Commission, 1961), pp. 1-2.

4. Letter from James Madison to Andrew Stevenson, November 17, 1830, cited in Max Ferrand, ed., The Records of the Federal Convention of 1787, 3 vols. (New Haven: Yale University Press, 1911). 3:494. This was part of a continuing debate between Madison and Hamilton concerning the intent and effect of the general welfare clause. The issue was in part settled much later by the Supreme Court in U.S. v. Butler with a ruling in favor of the Hamiltonian interpretation that the power to tax for the general welfare was not limited to the enumerated legislative powers. The Court suggested education as an example of an unmentioned area for which Congress had the power to tax. At the same time, however, the Court specifically refused to define the scope of the phrase "general welfare of the United States." In addition, the Court ruled that a particular exercise of power by Congress (regulating agriculture) was an unconstitutional infringement on state powers, and the decision therefore left the issue clouded. U.S. v. Butler, 297 U.S. 1, 65-76 (1935). Other Supreme Court decisions involving federal-state disputes in educational matters have been about equally divided between upholding state and federal power, depending upon the issue. Cf. Truman F. Pierce, Federal, State, and Local Government in Education (Washington D.C.: The Center for Applied Research in Education, 1964), pp. 9-10, 74-77.

5. Cummings v. Richmond County Board of Education, 175 U.S. 528, 545 (1899).

6. Springfield Township v. Quick, 22 How. 56 (1859).

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7. State ex rel. Board of Education of Minneapolis v. Erickson, 190 Minn. 216, 251 N.W. 519 (1933).

8. State v. Meador, 284 S.W. (Tenn.) 890 (1926).

9. Charles E. Stuart and Others v. School District No. 1 of the Village of Kalamazoo and Others, 30 Mich. 69, 85 (1874).

10. Conant, Jefferson, p. 53.

11. The Organic Act of the Territory of Montana of 1864 provided that certain lands be set aside for the support of schools:

    > Section 14. And be it further enacted, That when the lands in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.

12. Emmet J. Riley, Development of the Montana State Educational Organization, 1864-1930 (Washington, D. C.: Catholic University of America, 1931), p. 5.

13. Editorial, Montana Post, September 9, 1865.

14. Lyle L. Berg, "Montana Department of Public Instruction," Education in the States: Historical Development and Outlook, ed. Jim B. Pearson and Edgar Fuller (Washington, D.C.: National Education Association, 1969), p. 713. Cited hereafter as Berg, "Montana."

15. Ibid., p. 707.

16. Ibid., p. 708.

17. Ibid.

18. The Constitution of 1884 had already incorporated the major provisions for strengthening the structure of the educational system, such as specified means of support, specification of board of regents, designation of state superintendent as an elective office, and protection of school lands. These provisions were incorporated in much the same form in the 1889 Constitution. Several interesting changes were made, however, in other provisions. Most notable of these were restricting the school age from 5-21 (1884) to 6-21 (1889), eliminating the definition of "public school system,"

removing the proviso that state fund monies go exclusively to primary schools, and replacing the Board of Regents with a State Board of Education. See Article IX, Montana Constitution of 1884.

19. Berg, "Montana," p. 709.

20. *Ibid*., p. 711.

21. *Ibid*.

22. *Ibid*.

23. *Ibid*., p. 712.

24. Montana Education Association, "Here's How it Works: An Explanation of Montana's Equalization Program (1969 Revision)," (Helena, 1970), p. 7. These figures are somewhat deceptive because, due to increased costs, the percent of state aid rose only from 21.3 percent to 28.4 percent in the same period.

25. *Ibid*.

PART I

CHARACTER, RIGHTS, AND RESPONSIBILITIES

Tlön is surely a labyrinth, but it is a labyrinth devised by men, a labyrinth to be deciphered by men. The contact and the habit of Tlön have disintegrated this world. Enchanted by its rigor, humanity forgets over and again that it is a rigor of chess masters, not of angels. Already the schools have been invaded by the (conjectural) "primitive language" of Tlön; already the teaching of its harmonious history (filled with moving episodes) has wiped out the one which governed in my childhood; already a fictitious past occupies in our memories the place of another, a past of which we know nothing with certainty--not even that it is false.

Jorge Luis Borges
Labyrinth

It is a grand and beautiful sight to see a man emerge from obscurity somehow by his own efforts; dissipate, by the light of his reason, the darkness in which nature had enveloped him; rise above himself; soar intellectually into celestial regions; traverse with giant steps, like the sun, the vastness of the universe; and--what is even grander and more difficult--come back to himself to study man and know his nature, his duties, and his end. All of these marvels have been revived in recent generations.

Jean-Jacques Rousseau
First Discourse

CHAPTER II

THE CHANGING CHARACTER OF EDUCATION

What constitutes an education? Since the times when three years of the three R's was considered sufficient preparation for life, we have come to question the fundamental content and goals of formal education. Is education the acquisition of basic skills? Advanced technical training? General development of thinking ability? The inculcation of basic humanistic values? Encouragement of creativity? What are the powers and limits of society in developing the mind, character, and personality of the individual?

One trend in education is quite clear. In response to social needs for technical expertise, education has become increasingly a training course in specific professional skills. This has resulted more from the exigencies of industry and science than from a conscious design on the part of educators or government. Now, however, as people are beginning to take stock of their educational system, the question arises as to what, if anything, we expect from our schools in addition to technical skills. This question goes to the heart of our educational system and to the philosophy behind it.

A central theme in American education has been to treat the individual as a whole being, as an emerging citizen and contributing member of society, rather than as simply a potential element in a workforce. This is a principle announced by Jefferson and reiterated by Emerson, Thoreau, Dewey and other major contributors to American educational philosophy. The school system has attempted to implement this ideal through comprehensive and universal elementary and high schools. Locally controlled school systems have displayed a particular genius in providing the conditions for the development of a practically oriented, autonomous individual. But the pressures of financing and specialization have continually drawn the schools away from this ideal, and in the modern era the additional forces of inflation, technology and centralization have pulled even harder in the direction of defining education in terms of narrowly conceived spheres of expertise.

Strong critics of the modern system of American education have voiced disappointment in its results:

> One had to cram all this stuff into one's
> mind, whether one liked it or not. This
> coercion had such a deterring effect that,

> after I had passed the final examination, I found the consideration of any scientific problems distasteful to me for an entire year. . . . It is in fact nothing short of a miracle that the modern methods of instruction have not yet entirely strangled the holy curiosity of inquiry; for this delicate little plant, aside from stimulation, stands mainly in need of freedom; without this it goes to wrack and ruin without fail. It is a very grave mistake to think that the enjoyment of seeing and searching can be promoted by means of coercion and a sense of duty.[1]

That comes not from a professional critic or from a political source but from one of the greatest of modern scientists, Albert Einstein. A contemporary writer and student of modern education, Paul Goodman, expresses a similar view:

> In our situation. . . overcrowding and interference make individual attention and real teaching impossible; so that it could be said that the schools are as stupifying as they are educative, and compulsory education is often like jail.[2]

Goodman uses the dramatic term "compulsory mis-education" to refer to the restrictiveness and misdirection in the contemporary school system.[3] But one need not be as harsh a critic as Einstein or Goodman to appreciate the force of their comments. Eminent figures in the field of education such as James Conant[4] and Admiral Rickover[5] have attacked many aspects of the existing educational system as being antiquated for modern conditions and inhibitory to the full development of youth.

In general the criticism goes to two fundamental points: that the existing system is too preoccupied with producing technically trained people to fill roles in the labor force and consequently ignores the broader educational needs of a healthy society, and that the technical education which is provided is overly narrow and deficient. Together, these points articulate a widely held view that the modern educational system is falling short of an ideal which is within its potential to reach, the ideal which has guided American thought since Jefferson: the development of the "whole man" who is prepared to participate fully in society as a citizen and is able to contribute to the advancement of science and culture.

To the extent that the system is failing to attain or even pursue that ideal, society as a whole is the victim. High dropout rates, unfavorable comparisons with systems in other advanced societies[6] and harsh criticism by both teachers and students[7] suggest that the American educational system is not fulfilling its potential.

This, in turn, is bound to create problems for society, for any institution with such a profound influence on the formative stages of growth will have a determining effect on the quality of both public and private life. Democracy and human advancement, for example, are predicated on the existence of an enlightened public and creative leaders. A society's educational system is so interwoven into the social fabric that it becomes both a cause and a symptom of the condition of society as a whole.

Even if the critics are only partially right, there is reason for serious concern that the trends in American education may be taking us farther from, rather than closer to, basic social goals. Trends in the direction of rigidity, narrowness and excessive competitiveness are exactly the opposite of the qualities of flexibility, openness and cooperativeness which characterize a free and vital society. Our educational system may be becoming, rather than a force for the cultivation of the well-rounded citizen, simply a reflection of and contributor to the mechanistic tendencies in modern society.

Commentators suggest the causes for the problems of American education include insufficient financial and human resources, immobility in thinking and organization and structural deficiencies in society as a whole. Rickover and Conant for instance, see a failure to provide sufficient funds and talent, especially in certain areas of education, for operation above a mediocre level.[8] Eurich, Griswold, McMurrin, Campbell, Jackson and many others, on the other hand, complain of a strong resistance to innovation in the schools, which inhibits changes that could assist them in making better use of existing resources.[9] Goodman and Illich[10] offer the most pervasive criticism in declaring that the problems of education are a part of a general social malaise which is intensified under the pressures of modern life:

> Thus, a perhaps outmoded institution [the modern educational system] has become almost the only allowable way of growing up. And with this preempting, there is an increasing intensification of the one narrow experience, e.g. in the shaping of the curriculum and testing according to the increasing requirements of graduate schools far off in time and place. Just as our American

> society as a whole is more and more tightly organized, so its school system is more and more regimented as part of that organization.[11]

The process described here is circular: as the society becomes more and more specialized in serving the needs of the mass consumption age, the schools adapt themselves accordingly. But the schools, by producing students with increasingly limited perspectives adjusted to technological needs, tend to reinforce the trends toward narrowness and organized rigidity. The school system thus becomes an unwitting function in a technocratic system, which, once established, continues to expand through its own dynamics toward a potential Brave New World or 1984.[12]

However much Huxley and Orwell may have overdrawn their grim societies of the future, the trends they forecast are distinctly visible in the present. If the crucially formative functions of an educational system are neglected in favor of its efficient operation as part of the productive social machine, there is nothing to break a potentially vicious circle of institutional reproduction. In the descriptions of experts ranging from Conant to Goodman, from Rickover to Illich, education is in danger of becoming a self-propelling subsystem within the larger social system, immune to any fundamental change and subject only to the forces of purely technical interests.

> [W]hen we look at what the modern ideal of knowledge has become in the university, we find that at every turn it threatens to diminish what it had provised to enlarge: freedom, efficacy, and sharing. The modern ideal is summed up in the slogan about the "knowledge explosion," which the universities have done so much to detonate. So great is the proliferation of knowledge that the problem now is how to retrieve it from the swelling data banks where it is stored. Realistically, the knowledge means that a few know a great deal about how nature and society "work," while the rest of us are about as ignorant as we have always been. Further, as knowledge has become increasingly refined it becomes more inaccessible to the many, more esoteric, more removed from the world of common experience.[13]

The remedies proposed by the critics are as many and varied as the sources from which they come. But almost all share one recommendation--that the public re-examine its educational system in light of its own deeply held values and re-establish a conscious guidance of the system on this basis. Whether this means increasing economic support and a changed curriculum, as advocated by some; a vast introduction of educational experimentation, as suggested by others, or the wholesale restructuring or even dismantling of the existing school system, as prescribed by still others, the recommendations all call for a public reassessment of the goals of education and a clear understanding of the means necessary to achieve them. The common assumption behind this position is (1) that the educational establishment could become and, in fact, might be on the road to becoming as immobile and self-serving as any other bureaucracy, and (2) that this stagnating trend can be interrupted only if people will get clear in their minds what they want out of an education and will act on these goals. The critics are in a sense turning an academic version of an old phrase to the effect that "education is too important to be left to the educators."

The general alternative suggested is the task articulated by Wolin and Schaar:

> It will require something more of the humanists than a deeper retreat into the sanctuary of ingeniously obscure research, while mumbling incantations about "higher values." What it will require is a new focus, and the courage to withdraw human and material resources from the subjects which have high value on the current market, re-allocating them to the task of re-discovering and redefining the humanity and sociability which have become twisted and frustrated by the "single vision" of contemporary modes of organization and public purpose.[14]

What this means in practical terms is not simply experimentation with new techniques in the school system but a whole rethinking of educational forms and practices. Certainly the raising of achievement levels through better educational techniques is a part of this, so that more people can be educated to higher levels for less money; even more important is a reconsideration of what the "schooled" society is all about. If the present educational system is to some degree simply a baby-sitting and career-ticket issuing agency, then the question becomes what institutional farms might better serve the development of skilled workers, active citizens and sound thinkers.

Goodman proposes the elimination of compulsory education and its replacement by opportunities for training in practical activities outside the classroom, such as work in agriculture, construction or journalism, together with a loosely decentralized system of small classrooms taught by both professional and non-professional educators. He envisions a highly fluid and multi-faceted educational framework in place of the rather monolithic one which has installed itself as the only legitimate dispenser of learning. One possibility he suggests is that

> on the model of the late GI-bill we experiment, giving the school money directly to the adolescents for any plausible self-chosen educational proposals, such as purposeful travel or individual enterprise. This would also, of course, lead to the proliferation of experimental schools.[15]

Similarly, he advocates a two-year interim of practical work experience between high school and college and modern use of the Athenian model of an open-ended primary education. He reminds us that the word "school" derives from the Greek word for serious leisure. In sum, Goodman aims to provide an alternative to an educational system which he maintains is increasingly becoming a lockstep channeling into preordained patterns of career and life:

> My purpose is to get people at least to begin to think in another direction, to look for an organization of education less wasteful of human resources and social wealth than what we have. In reconstructing the present system, the right principles seem to me to be the following: To make it easier for youngsters to gravitate to what suits them, and to provide many points of quitting and return. To cut down the loss of student hours in parroting and forgetting, and the loss of teacher hours in talking to the deaf. To engage more directly in the work of society, and to have useful products to show instead of stacks of examination papers. To begin to decide what should be automated and what must not be automated, and to educate for a decent society in the foreseeable future.[16]

Another similarly oriented student of modern educational techniques recommends four approaches by which such an open system could be made to function: (1) a vast increase of reference services to facilitate access to objects or processes used for formal learning; (2) "skill exchanges" to provide a central listing service for people with particular skills who are willing to serve as models for others; (3) a "peer-matching" network to provide for communications among those looking for others to join with in a given learning activity, and (4) reference services to "educators-at-large" who would not operate in a particular institution but would furnish their services to a wide variety of groups.[17]

Some of these innovations are being tried today. Others, which may seem unrealistic at present, very likely will not be tomorrow. With rapidly changing technology and attitudes, the possibilities for new styles and structures in education are becoming greater and greater. The question becomes not whether, but in which direction we want to move, with what goals in mind, and through what means. Goodman and Illich describe some possibilities; there are countless others. The point is that it is at the base a matter of public choice; if the public does not take in hand its responsibility for the aims and designs of its educational system, the choice will be made by default, probably through institutional inertia.

CHAPTER II

NOTES

1. Albert Einstein, "Examining in Harvard College," Albert Einstein: Philosopher-Scientist, Library of Living Philosophers, ed. Paul A. Schilpp, Vo. 7 (Evanston, Ill.: Library of Living Philosophers, 1949), p. 17.

2. Paul Goodman, Growing Up Absurd (New York: Random House, 1960).

3. Paul Goodman, Compulsory Mis-education and The Community of Scholars (New York: Alfred A. Knopf, 1964).

4. James B. Conant, The American High School Today (New York: McGraw-Hill, 1959); Conant, Shaping Educational Policy (New York: McGraw-Hill, 1964); Conant, Slums and Suburbs (New York: McGraw-Hill, 1961).

5. H.G. Rickover, American Education--A National Failure (New York: E. P. Dutton and Co., Inc., 1963).

6. Conant, The American High School Today, Section One, ff.; Rickover, American Education--A National Failure; Arthur H. Moehlman, Comparative Educational Systems (Washington, D.C.: The Center for Applied Research in Education, Inc., 1963), Chapters Two, Five, and Seven, ff.

7. Herbert R. Kohl, The Open Classroom (New York: Random House, 1969); Sheldon S. Wolin and John H. Schaar, The Berkeley Rebellion and Beyond (New York: Random House, 1970); Alvin C. Eurich, ed., Reforming American Education (New York: Harper and Row, 1969); Alvin Toffler, ed., The Schoolhouse in the City (New York: Frederick A. Praeger, 1968); Eda J. LeShan, The Conspiracy Against Childhood (New York: Atheneum, 1967); Robert M. Hutchins, The Conflict in Education in a Democratic Society (New York: Harper and Brothers, 1953).

8. Rickover, American Education--A National Failure; Conant, The American High School Today.

9. Eurich, Reforming American Education; A. Whitney Griswold, Liberal Education and the Democratic Ideal (New Haven: Yale University Press, 1959); Sterling M. McMurrin, "Introduction," Roald F. Campbell, "Teaching and Teachers--Today and Tomorrow," and Philip W. Jackson, "Technology and the Teacher," in McMurrin, ed., The Schools and the Challenge of Innovation (New York: McGraw-Hill, 1969). See also Toffler, ed., The Schoolhouse in the City.

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10. Goodman, Compulsory Mis-education and Growing Up Absurd; Ivan D. Illich, Deschooling Society (New York: Harper and Row, 1971).

11. Goodman, Compulsory Mis-education, pp. 17-18.

12. Aldous Huxley, Brave New World (New York: Garden City, 1932); George Orwell, 1984 (New York: Harcourt, 1949).

13. Wolin and Schaar, "Education and the Technological Society," The Berkeley Rebellion and Beyond, p. 109.

14. Ibid., pp. 116-117.

15. Goodman, Compulsory Mis-education, pp. 61-62.

16. Ibid., p. 153.

17. Illich, Deschooling Society.

CHAPTER III

EDUCATION AS A RIGHT AND AN OBLIGATION

Although the notion of education as a right can be traced to classical sources such as Plato, Rousseau and Schiller, intensive concern with educational rights has been largely a product of the modern mass educational system. This concern is directed toward the dual characteristics which hold for rights in general: the right of access to and the right of protection from a particular function of society. In this case, the issue becomes, on the one hand, the right to the benefits of a public educational system, and, on the other hand, the right to secure an individual from domination by that educational system.

THE RIGHT TO AN EDUCATION

Education gradually has come to be considered a right in the United States, and the courts across the country commonly have interpreted it as such. For example, the Colorado Supreme Court has variously described free public education as a constitutional right,[1] a civil right or privilege[2] and a duty of the state.[3] The effect of these decisions is summarized as follows: "A public schooling is both a right of the student and his parents, and a legal duty that both must meet. . . ."[4]

Only North Carolina and Puerto Rico specifically enumerate the right to an education in their constitutions. Most states, however, include a provision declaring it a duty of the legislature to provide a system of free public schools. The Montana provision, for instance, reads,

> It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools. [Art. XI, Sec. 1]

Montana, in addition, goes further than most states in spelling out in two more sections what this duty shall be:

> It shall be the duty of the legislative assembly to provide by taxation, or otherwise, sufficient means. . . . to maintain a public, free common school in each organized district in the state, for at least three months in each year. [Art. XI, Sec. 6]
>
> The public free schools of the state shall be open

> to all children and youth between the ages of six and twenty-one years. [Art. XI, Sec. 7]

The close connection between the concepts of the right of an individual and the duty of a state is evident in the North Carolina provision:

> The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right. [Art. I, Sec. 27]

Courts across the country have predominatly ruled that the state's duty to provide schools implies an individual's right to attend them. However, a distinction between right and duty arises in cases involving eligibility for attending school. For example, the Illinois Supreme Court ruled that the right to an education does not extend to mentally deficient persons:

> Under the constitutional provision requiring the General Assembly to provide a system of common schools whereby all children may receive a good "common school education," the quoted implies capacity as well as the right to receive the common training.[5]

The Montana Supreme Court also recognized the distinction between duty and right in citing a famous decision in which the New Hampshire Supreme Court stated:

> The primary purpose of the maintenance of the common-school system is the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends. _Free schooling furnished by the state is not so much a right granted to the pupils as a duty imposed upon them for the public good_ [emphasis added].[6]

In Montana, the notion of viewing education from the standpoint of the state rather than of the individual goes back to early decisions of the State Supreme Court. In _Evers v. Hudson_ (1907), the Court declared Article XI, Section 1 ("It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common, schools") to be a "solemn mandate to the legislature for the purpose of insuring to the people the system described."[7] The _Evers_ decision is referred to in a later case in which the Court asserted in strong terms the state's interest in the child:

> By its voluntary act, the state has assumed the function of education primarily resting upon the parents. . . . In doing so, the state is not actuated by motives of philanthropy or charity, but for the good of the state, and, for what it expends on education, it expects substantial returns in good citizenship.[8]

In another case, the Montana Court invoked both the notion of the duty of the state [from Art. XI, Sec. 1] and the right of an individual in deciding in favor of the right of a primarily Indian group to establish a new school district. The Court cited a California decision in which it was held:

> The common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. These are rights and privileges which cannot be denied.[9]

However, in a recent case it was held that the duty of the state to provide an education for all children as provided in Article XI, Section 1 was subject to a limiting interpretation:

> [W]e shall examine the wording of the Constitution and statutes to determine what was meant by the framers of the Constitution. In other words, what does the term "all" mean? Should it be taken in its universal and omnibus sense, that is, literally all? Or rather, was it meant to be limited and qualified to conform to good reason to carry out the other purposes of the Constitution such as to have a general, uniform and thorough system of public schools?[10]

Thus, the commonly acknowledged right to an education can be more easily limited by the courts when it is only implied from duty and not guaranteed as a right. This applies to disputes involving eligibility requirements, such as age, as well as to those involving extensions of the educational program, such as vocational and community college programs.[11]

Other fundamental aspects of the right to an education, such as equal educational opportunity and religious freedom in education, are so basic that they will be treated separately in a later chapter. These issues involve rights guaranteed under the federal Constitution and thus transcend matters purely internal to state constitutions.

Another important issue relative to educational rights is the distinction between the right of the parent to educate and the right of the child to be educated. The discussion in this chapter is almost exclusively in terms of parental rights, in spite of the fact that increasing attention is being given to the rights of children themselves. The legal situation is as yet far from being resolved; one writer refers to the question of children's rights as "a legal vacuum."[12] To what degree parental rights to education devolve upon children thus judicially is still an open question. The federal Supreme Court however, has ruled in In re Gault that some federally protected rights extend to children.[13] Presumably, then, to the extent that the right to an education is derived from the Ninth (unenumerated rights retained by the people) and Fourteenth (due process and equal protection of the laws) amendments of the U.S. Constitution, this right also would apply to children. Further discussion of children's rights appears in the report on the Bill of Rights in the series of studies for the Montana Constitutional Convention.

THE RIGHT NOT TO BE EDUCATED

The other side of a basic educational right is the right to determine one's own educational fate free from state domination. The clarification of this right has emerged primarily in disputes involving compulsory education and parental choice. The U.S. Supreme Court has decided a group of cases which place greater stress on the right of the parent as opposed to that of the state, but this protection has been asserted primarily in the face of arbitrary state actions. In Meyer v. Nebraska (1923), for instance, the Supreme Court ruled invalid a state statute which prohibited the teaching of German to children under twelve. This became the Meyer Doctrine, which recognized the constitutional right of parents to educate free from state legislation that "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[14]

The Meyer decision relied primarily on the Fourteenth Amendment's guarantee that no person shall be deprived of "liberty . . . without due process of law." The court stated:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term

> has received much consideration. . . . Without doubt, it denotes. . . the right of the individual to. . . marry, establish a home and bring up children, to worship God according to the dictates of his own conscience.[15]

The most notable case establishing the right of the parent to educate is Pierce v. Society of Sisters, decided two years after Meyer. In it, the Court pronounced unequivocably that parents possess at least some rights over their children's education which are immune from state control:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[16]

Since those two landmark decisions, other cases have upheld the constitutionally mandated duty of the state not to "unreasonably interfere" with the parents' right to control the education of their children. In West Virginia State Board of Education v. Barnett, for example, the U.S. Supreme Court held that:

> The Fourteenth Amendment, as now applied to the states, protects the citizens against the State itself and all of its creatures--Boards of Education not excepted. . . . That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual. . . .[17]

However, the rather strong doctrine articulated in Pierce and the other cases has been somewhat softened by the fact that in none of these cases was there a direct confrontation between the right of the parent and what could be considered to be a valid state interest. The courts, in fact, have sought to avoid such confrontations in the form of the balancing doctrine, as stated in a New Hampshire case:

> In the adjustment of the parent's right to choose the manner of his children's education, and the impinging right of the state to insist that certain education be furnished and supervised, the rule of reasonable conduct upon the part of each toward the other is to be applied.[18]

In reference to the general position which emerges from these cases, one commentator states:

> One fundamental characteristic common to all such cases is their recognition of an inherent constitutional privilege possessed by every parent; but which privilege has never been properly defined.[19]

The court decisions in the Amish school cases thus have become important in providing elaboration of this issue. Although the additionally complicating factor of religious freedom was involved in these, the cases in general involved a direct conflict between the state's power under compulsory school laws to require school attendence and parents' rights to determine the kind of education given their children. The doctrine that the state's power to interfere in private educational systems is limited was already established in Farrington v. Tokushige, in which the Court declared that the state has no power

> to give affirmative direction concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks.[20]

The Amish cases provide a further test of this principle in that Amish schools fail to meet state educational standards in numerous ways. In most cases, courts have deciced against the Amish on the basis that no fundamental rights were being interfered with by compulsory school attendance and that the state had an overriding interest in public education. However, in the Petersheim case, the Pennsylvania court ruled that compulsory attendance laws could not be enforced against the Amish, because to do so would constitute "an abridgement and infringement of their constitutional rights of liberty and conscience."[21] Paul T. Burin notes in "The Right Not to Be Modern Men: The Amish and Compulsory Education," that counter to the state's interest in compulsory school attendance,

> There is a countervailing, though largely undefined, policy of pluralism and deference to minority ethnic groups that supports the Amish refusal to be modern men. Pluralism is a shibboleth of American society, perhaps more honored in oratory than in practical tolerance.[22]

In a more recent decision, the Wisconsin Supreme Court in State v. Yoder ruled in favor of the Amish, largely on the basis that compulsory school attendance for Amish children represented an infringement upon the free exercise of religion.[23] However, in passing, the court also ruled that compulsory education, although a permissible area of state regulation, is not a compelling state interest. This ruling, if applied consistently in other areas and if upheld by the U.S. Supreme Court, would constitute a significant strengthening of paternal rights to educate at the expense of state power.

An alternative means for protecting the same right, without directly challenging the state's "compelling" interest in compulsory education, is suggested in Prance's commentary on the Amish decisions. He suggests that a strict distinction be drawn between "compulsory education" and "mandatory school attendance." With this distinction, one could uphold the policy behind compulsory education, (i.e. protection of the welfare of the individual and the interests of the state), while making exceptions in reasonable instances to the rule of mandatory school attendance:

> One would be hard pressed to argue that Amish agricultural or vocational training resulted in a deprivation of fourteenth amendment freedoms while terminal education in an overcrowded, understaffed city school did not. Indeed the acknowledged worth of the Amish alternative, contrasted with the well known shortcomings of formal public education, should. . . bring that alternative well within the scope of constitutionality.
>
> In summary, it seems clear that Amish constitutional protection could readily coexist with mandatory school attendance laws if those laws were enforced with an eye to the policies behind them and an appreciation of the unique function and utility of the Amish alternative to formal secondary education.[24]

The Amish cases, as many commentators have noted, have a significance far beyond their immediate issue. The fundamental principle involved is the protection of minority freedom of conscience from state domination:

> Public schools--like Amish, Hutterite, Black Muslim, Lutheran, Catholic, Jewish, Greek Orthodox, and Seventh Day Adventist schools--seem inevitably the servants of their constituencies, reflecting the dominant values of the subcultures they serve. . . . What agency of the

> state, then, may be trusted to select an educational format so superior or allegedly neutral that it may be imposed on every child? The destinies of the young will often be misguided by parents, but this state seems far less lethal than the alternative of giving government the ultimate power of indoctrination.[25]

The possibility of development of a wide variety of nonpublic educational institutions, both religious and nonreligious, which offer viable alternatives to traditional educational structures is a very likely prospect with which all states must reckon. The protection of self-determination within reasonable limits for both the parent and child in educational matters is a significant factor in this potential development.

Another aspect of individual educational rights is the increased concern for the protection of the individual in the face of the growing power of the modern state. The state in the contemporary era has gained an enormous amount of power through information storage facilities and other products of technology. One writer observes:

> Modern technology and an emerging social ethic have placed unprecedented bounds on the realm of individual liberty. Technology has severely limited the scope of behavior which affects only the actor. . . . This interdependency makes purely individual behavior almost non-existent and justifies an ever increasing claim to societal control of individual action for the collective good.[26]

The general concern with protecting individual liberty from a state which has the potential of becoming a technological leviathan has as a corollary an emphasis on individual educational rights. Just as the right to privacy is currently argued to be among the unenumerated rights referred to in the Ninth Amendment,[27] so an individual's right to be educated and to determine the form of his education may come to be part of the basic protection of the individual from the state.

CONSTITUTIONAL ISSUES

The present status of educational rights is less than clear. Decisions in state and federal courts have molded something of a broad doctrine of the right to an education and the right to self-determination in educational matters, but this doctrine is evolving in a sometimes contradictory fashion. The courts often have been reluctant to tackle the issues head-on because of the nebulous state of authority in the educational field. The definition of educational rights that has occurred generally has been derived from applicable parts of the First and Fourteenth amendments to the federal Constitution. The U.S. Supreme Court has been hesitant to involve itself directly in the issue of states' rights and powers in education (other than on the question of equality of educational opportunity) because this is an area traditionally reserved to state jurisdiction.

This seems to leave the matter squarely in the lap of the states. But the states generally have preferred to rely on court interpretations of existing constitutional provisions and statutes concerning the establishment of a school system and mandatory attendance. And because of the vagueness of the legal situation, the courts, for their part, seem to be finding increasing difficulty in setting out the rights of the individual in relation to the state in educational matters.

One way out of this circular process would be simply to wait until state and federal courts have sorted out the respective rights and powers to their own satisfaction. Another solution would be to specify in a state constitution the right of the individual to an education and/or the right to freedom of choice, to the kind of education received. Puerto Rico goes farthest among all the units of American government in specifying such rights in its Bill of Rights:

> Every person has the right to an education which shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. . . . Compulsory attendance at elementary public schools to the extent permitted by the facilities of the state as herein provided shall not be construed as applicable to those who receive elementary education in schools established under non-governmental auspices. [Art. II, Sec. 5]

The Puerto Rican Constitution subsumes all provisions for education under this section on educational rights, making the right the paramount concern in educational matters. It can be argued that this is the correct priority because of the pre-eminence of the individual over the state in American democratic theory. On the other hand, if one wishes both to secure educational rights and to establish more extensive provisions on the structure and operation of the educational system, there is a strong argument for inclusion of separate constitutional articles on each topic.

33 [illegible] 144 A. 170, 171 (1929).

1. People ex rel. Vollmar [illegible]

[illegible] Equal Educational [illegible]

[illegible]

Illinois Dept. of Public Welfare v. Haas, [illegible]

State ex rel. [illegible] v. School District No. 73, 106 [illegible]

[illegible] N.E. 495, [illegible] 121, 173 [illegible]

Ward v. School District No. 1, [illegible] 413

[illegible]

10. [illegible]

11. Evelyn R. Fulbright and Edward C. Bolmeier, Courts and the Schools (Cincinnati: The W. H. Anderson Co., [illegible]) pp. 10-38 ff.

See Lois G. Forer, "The Rights of [illegible]" [illegible] Association Journal 58 [illegible]

In re Gault, 387 U.S. 1, 13 (1967) [illegible]

As reflected in in Pierce v. [illegible] 510, 534-5 (1925). The [illegible] 462 U.S. 320 ([illegible]

CHAPTER III

NOTES

1. People ex rel. Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927).

2. Zavilla v. Masse, 112 Colo. 183, 147 P.2d 823 (1944).

3. Florman v. School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469 (1895).

4. Elsie M. Martin, "The Right to Dress and Go to School," University of Colorado Law Review 37 (1964-65): 496.

5. Illinois Dept. of Public Welfare v. Haas, 15 Ill. 2d 204, 154 N.E. 265 (1958).

6. State ex rel. Lien v. School District No. 73, 106 Mont. 223, 226-227 76 P.2d 330 (1938), citing Fogg v. Board of Education, 76 N.H. 296, 82 Atl. 173, 174.

7. Evers v. Hudson, 36 Mont. 135, 150, 92 P. 462 (1907).

8. McNair v. School District No. 1, 87 Mont. 423, 428, 288 P. 188 (1930).

9. Grant v. Michaels, 94 Mont. 452, 465, 23 P.2d 266 (1933), citing Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926, 930.

10. State ex rel. Ronish v. School District No. 1, 136 Mont. 453, 460, 348 P.2d 797, (1960).

11. Evelyn R. Fulbright and Edward C. Bolmeier, Courts and the Curriculum (Cincinnati: The W.H. Anderson Co., 1964), pp. 10-38 ff.

12. See Lois G. Forer, "The Rights of Children: A Legal Vacuum," American Bar Association Journal 55 (1969): 1151.

13. In re Gault, 387 U.S. 1, 13 (1967).

14. As referred to in Pierce v. Society of Sisters, 268 U.S. 510, 534-5 (1925). The original case was Meyer v. Nebraska, 262 U.S. 390 (1923).

15. Meyer v. Nebraska, p. 399.

16. Pierce v. Society of Sisters, p. 535.

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17. West Virginia State Board of Education v. Barnett, 319 U.S. 624, 637 (1943).

18. State v. Hoyt, 84 N.H. 38, 41, 146 A. 170, 171 (1929).

19. Michael Flynn, "Community Control of the Public School--Practical Approach for Achieving Equal Educational Opportunity: A Socio-Legal Perspective," Suffolk University Law Review 3 (1969): 308, 326.

20. Farrington v. Tokushige, 273 U.S. 284, 298 (1927).

21. Commonwealth v. Petersheim, 70 Pa. D&C 432, 442 (Somerset County Ct. 1949), appeal dismissed, 166 Pa. Super. 90, 70 A.2d 395 (1950).

22. Paul T. Ruxin, "The Right Not to Be Modern Men," Virginia Law Review 53: (1967): 925, 931.

23. State v. Yoder, 49 Wis.2d 430, 182 N.W.2d 539 (1971).

24. Norman R. Prance, "The Amish and Compulsory School Attendance: Recent Developments," Wisconsin Law Review 10 (1971): 832, 852.

25. Donald A. Erickson, "Showdown at an Amish Schoolhouse: A Description and Analysis of the Iowa Controversy," Public Controls for Nonpublic Schools, ed. Donald A. Erickson (Chicago: University of Chicago Press, 1969), pp. 55-56.

26. George E. Garvey, "Unenumerated Rights--Substantive Due Process, The Ninth Amendment, and John Stuart Mill," Wisconsin Law Review 1971: 922.

27. Ibid. ff.

CHAPTER IV

EQUAL EDUCATIONAL OPPORTUNITY

Beyond the question of the general right to an education lies the question of the equality of that right. Courts and legislatures in recent years have established the principle that not only do all persons have the right to receive an education, but that they have the right to receive it on approximately equal terms. "Equality of educational opportunity" has become an accepted maxim and a standard for assessing state educational programs.

Despite that commitment in principle, however, a great deal of factual inequality still persists. America spends approximately twice as much educating the children of the rich as it does educating the children of the poor.[1] A substantial amount of de facto segregation still exists in the schools.[2] Educational facilities available to minority groups often are significantly inferior to those available to the rest of the population.[3]

The existence of such clear inequities in a system of such crucial importance, theoretically guaranteed to be open and free to all, raises general questions of equality as a social value. What is meant by the term "equality" in modern society? Certainly not absolute equality, because such an ideal, which would require all members of society to be absolutely identical, is clearly unattainable even if it were desirable. Neither is meant a classical laissez faire equality, under which everyone is equally free to compete, although not with equal means--a sort of majestic equality of the law, Anatole France once remarked, which forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread. The concept of equality in contemporary society lies somewhere between these two extremes in an area defined by resolution of concrete issues of equitable treatment.

The progressive definition of equality in the modern sense began in the classical liberal utilitarianism of John Stuart Mill and Jeremy Bentham in their articulation of the principle, "every man to count for one and no man to count for more than one."[4] At first this was defined in a moral, or at most, a political sense. But with the gradual weakening of the notion of an "invisible hand" of society which operated to maximize the common good on the basis of equal moral or political rights, this maxim was broadened to include other social and economic factors. Beyond the traditional notions of equality in the courts and in the voting booths, there arose the concept of the equal right of an individual to some minimum enjoyment of the benefits of society, such as nourishment, health care and education. The modern concept of equality thus became the product of two principles: (1) that the rules of law must be equally applied, and

(2) that laws themselves must satisfy some broader standard of equity.

Education, as a fundamental service provided by the state, as a primary means to the acquisition of property and as an essential factor to development of the individual, became a particularly crucial concern in contemporary thrusts toward social equality.

The nineteenth century effort in the United States to establish a universal, free primary and secondary education system contributed greatly to the egalitarian movement. Education involved both the demand for uniform application of the laws (for example, states constitutionally stated obligations to provide a system of free public schools) and the demand for equal access to the basic benefits of society (such as knowledge, wealth and security). In the latter respect, education was seen as the single most important social means for opening the door to the opportunities afforded by the new world. School preempted even money as the great social equalizer, because school became a prerequisite to the attainment of wealth.

With the modern acceptance of equal rights as a concept which transcends simple equality before the law and the gradual recognition of education as a fundamental right and interest of man, the question arises as to how far the state is required to go in guaranteeing equal educational rights. To be sure, equality is only one among a number of cardinal social values and one which may, if promoted far enough, come into conflict with others such as liberty and fairness.[5] Yet it is such a basic value and education such an indispensible part of men's lives that political and judicial bodies have pressed for the realization of some substantial amount of equality in the kind of education available to all children. The modern state has accepted its responsibility to go far beyond the mere elimination of overt legal hindrances to obtaining an education and has taken positive steps to provide minimum standards of education.

Richard Wollheim suggests a distinction between "an equal right to property" and "a right to equal property."[6] This distinction, an important one when applied to rights and private spheres of action, tends to blur when applied to a benefit provided at public expense by the state; thus, the right to an equal educational opportunity merges into the right to a substantially equal education. Recent American court decisions have adopted the principle that if substantial inequality in education can be shown, the presumption is that the state must show a compelling reason why the inequality exists, rather than that one affected must show why equality should exist. This position is discussed at length below. Equal educational opportunity thus has come to mean in the modern context not only that everyone deserves an equal opportunity for an education but that everyone should have the opportunity for an equal (basic) education.

COURTS AND THE FOURTEENTH AMENDMENT: HAVING ONE'S CAKE AND EATING IT TOO VS. HAVING NO CAKE AT ALL

Although the meaning of equality may be set forth rather easily in abstract terms, the actual interpretation of what it means in practice must await resolution of conflicts on specific issues. The concrete determination of educational equality has occurred through a series of judicial decisions in several areas of education. Underlying them all has been the fundamental principle articulated in the Fourteenth Amendment to the U.S. Constitution:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The primary emphasis in these decisions has been on the "equal protection clause" of this Amendment, but some reliance has also been made on the "due process clause." The general standards which have emerged from the recent test cases have been that (1) the state's classification of citizens for the purpose of state action must be related to a valid state interest; (2) the basis of classification must not be of a "suspect" sort; (3) the state must preserve the "fundamental interests" of its citizens, and (4) the more fundamental the interest and the more suspect the classification, the more compelling must be the state's interest in preserving the classification in question. That is, the state must have overwhelming reasons to discriminate through a classification which provides unequal treatment for citizens in an area of vital human concern. In the field of education these tests have been invoked primarily against classifications by race and wealth.

Classification by Race

The perspective of the United States Supreme Court has changed a great deal since the time when it declared the Negro race to be "a subordinate and inferior class of beings, who had been subjugated by the dominant race" and that a Negro slave was "like an ordinary piece of merchandise and property" who had none of the rights declared for all men in the Declaration of

Independence.[7] Change came only gradually, however. In 1896 the Court upheld in Plessy v. Ferguson a statute providing for "separate but equal" railroad accommodations for white and "colored" persons.[8] This landmark decision set the precedent in interpretation of the Fourteenth Amendment for the following sixty years. The "separate but equal" doctrine was first applied specifically to education by the U.S. Supreme Court in a case involving the closure of a Negro high school in Georgia.[9]

Although the "separate but equal" doctrine never was directly and publicly questioned by the Court until it was reversed in 1954, the Court's rulings in the preceding years began to make it increasingly costly for a state to maintain equal and separate facilities. The following list summarizes the major Supreme Court decisions which led to the transformation in 1954:[10]

> [1938] Missouri v. Canada, 305 U.S. 337 In this case, the Court declared that a state denied equal protection of the law when it failed to provide a comparable legal education for Negroes within the state.
>
> [1948] Sipuel v. Board of Regents, 322 U.S. 631 Oklahoma was obliged to provide legal education for a qualified Negro applicant.
>
> [1948] Fisher v. Hurst, 333 U.S. 147 The Court required the admission of a Negro to the state law school in Oklahoma, holding that no other applicant could enroll until a law school with equal facilities should be provided for Negroes.
>
> [1950] Sweatt v. Painter, 339 U.S. 629 A separate law school for Negroes was held to be inferior and therefore the equal protection clause required that qualified applicants must be admitted to the University of Texas.
>
> [1950] McLaurin v. Oklahoma, 339 U.S. 637

In the latter two cases the Court weakened the "separate but equal" doctrine considerably but refused to abandon it. The McLaurin case demonstrated that the justices were unwilling to allow segregated status within a single institution to be considered "equal" education. The plaintiff, McLaurin, had classes with white students but was assigned a special "colored" seat in each classroom, was required to sit at a special table in the library and was allowed to dine only in a segregated portion of the cafeteria. This, the Court declared, amounted to an unequal education imposed by the state and was therefore unconstitutional.[11]

The watershed decision on segregation in education came in Brown v. Board of Education (1954).[12] In ruling that Mr. Brown's daughter could not be forced to attend a separate school solely on the basis of her color, the Supreme Court finally struck down the entire "separate but equal" doctrine. This case and the second Brown decision[13] in the following year sent shock waves into American education which are still being felt more than fifteen years later. Two primary principles were thereby announced: (1) that classification on the basis of race in education is discriminatory and is therefor unconstitutional per se, and (2) that education has fundamental status as a right.

The Court articulated the first principle as follows:

> To separate [Negroes] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . .
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[14]

The second principle was stated as follows:

> We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.
>
> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstate our recognition of the importance of education of our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed

> forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[15]

The Brown decision began not only a transformation in education but also sponsored, as one author notes, an "egalitarian revolution in judicial doctrine that has made dominant the principles to be read into the equal protection clause."[16] Brown represents a radical departure from the traditional interpretation of equal protection that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[17] In place of this test, Brown ushered in what has been termed the "new equal protection" doctrine:

> [T]he court must decide (a) whether the classification results in a discrimination against a disadvantaged group; (b) whether [the classification] . . . relates to an interest that is "basic" or "fundamental" or "critical," and, assuming a sufficiently affirmative answer to these two questions [separately or] in combination, (c) whether the state's asserted justification is "compelling" enough to overcome the . . . presumptive invalidity . . . in a phrase like "strict scrutiny."[18]

Justice Harlan, in a dissenting opinion to Shapiro v. Thompson (1969), provides a more concise version:

> [S]tatutory classifications which either are based upon certain "suspect" criteria or affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling" governmental interest.[19]

Education, as has been seen in Brown, has been imputed the status of a "fundamental interest." Classification by race, above any other factor, has been interpreted as "suspect" or "invidious."[20] Thus, classification in educational matters on the basis of race is by this standard clearly unconstitutional. In addition, the Court has enumerated at least two other sorts of suspect classifications which, in interference with a fundamental interest, invalidate a state's action: wealth and geography. These are discussed in the following section.

A further dimension of the "new equal protection" which has evolved since Brown is a focus upon the activity or passivity of state action. The first Brown opinion declared school segregation "inherently unequal," but only the second Brown decision directed the states to provide relief. In the latter opinion, the Court began to develop the notion of a mandate for positive state action to eliminate discrimination in education. Racial discrimination was unconstitutional, the Court declared, and "[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle" [emphasis added].[21] With this holding, the courts began to forge a new notion of state action in countering racial discrimination; that notion has evolved in the form of two principles: (1) states must not be implicated in supporting de facto segregation, and (2) states must take positive action to eliminate both de jure and, in some instances, de facto racial segregation in the schools.

The issue involved here, Kurland notes, is

> whether the command implicit in equal protection constitutes merely a ban on the creation of inequalities by the state or a command, as well, to eliminate inequalities existing without any direct contribution thereto by state action. "Equality" like "liberty" has both a positive and negative aspect . . . . [The question is] whether the state was not only required to abstain from commanding segregation but was under the affirmative duty to integrate the school system.[22]

The Supreme Court for some time avoided the issue by refusing to rule on lower court decisions which, as in Bell v. School City of Gary,[23] denied the duty of the state to eliminate de facto segration. On the other hand, the Court appeared to accept the principle that a state may take positive steps to eliminate de facto discrimination by also refusing to rule on cases in which lower courts had upheld action taken by education boards to integrate schools.[24]

More recently, the Supreme Court has moved closer to the position that positive action to achieve integration is required of the state. In Green v. County School Board, the Court held that school boards "operating state-compelled dual systems . . . [are] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[25] In *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the Court unanimously held that neighborhood schools were insufficient if a greater racial balance could be created by requiring students to attend a more distant school, thus giving the Court's sanction to busing.[26]

In this case, the Court upheld a decision by a district court in which the district court judge had clearly set out the contemporary reasoning about state action:

> The system of assigning pupils by "neighborhoods" with "freedom of choice" for both pupils and faculty, superimposed upon an urban population pattern where Negro residents have become concentrated almost entirely in one quadrant of a city of 270,000, is racially discriminatory. This discrimination discourages initiative and makes quality education impossible. The quality of public education should not depend on the economic or racial accident of the neighborhood in which a child's parents have chosen to live--or find they must live--nor on the color of his skin. The neighborhood school concept never prevented statutory racial segregation; it may not now be validly used to *perpetuate* segregation [emphasis in original].[27]

The Court appears to have come very close to an unqualified assertion of the state's duty to take *positive action* to eliminate *de facto* as well as *de jure* racial discrimination which violates the equal protection guarantees of the Fourteenth Amendment. Other forms of discrimination are being tested by this principle; the results are exerting a powerful influence on the educational structure.

Classification by Wealth

A second major category of state classification which has come into question under the equal protection clause is classification by wealth. In contrast to the well-established principles of nondiscrimination in racial cases, the principles involved in classification by wealth are the subject of considerable legal dispute. Such commentators as Wise and Carter, for instance, argue that decisions involving voting rights and rights of indigent defendants in criminal prosecutions have established wealth as a properly "suspect" classification for the purpose of state action.[28] Michelman and Brest dispute this interpretation of "wealth as an invidious category and prefer to emphasize instead the particular kind of interest (e.g., voting or legal defense) disturbed by the state's action.[29]

Part of the controversy centers around the nebulous distinction between de jure and de facto wealth classifications. While it seems generally agreed that an out-and-out de jure classification by wealth which adversely affects an individual is "suspect" under the equal protection clause, the difficulty arises in determining what in fact is a wealth classification. A required payment for the enjoyment of any governmental activity may and often does pose a deterrent to the poor but not to the rich, but it would be a very sweeping change indeed to abandon all such fees. On the other hand, when certain court costs effectively deprive an indigent of his day in court, the U.S. Supreme Court has ruled such payment barriers unconstitutional.[30] There is a broad area of fuzziness between areas which can be clearly staked out as de jure and those which can be labelled as de facto governmental wealth classifications.

The courts have picked their way through the mine-fields of such theoretical difficulties and appear to have arrived at something like a "new equal protection" doctrine applied to wealth: Given that a state's action results in some general classification on the basis of wealth (such as costs for a government service), the more "fundamental" the individual's right or interest deprived, the more compelling must be the state's reason to preserve the classification.[31]

The primary Supreme Court cases involved in the evolution of this general position are:

1941 Edwards v. California, 314 U.S. 160

The Court reversed an earlier decision which declared persons without funds a "moral pestilence" and declared than a man could not be deprived of his freedom merely because he had no property.

1956 Griffin v. Illinois, 351 U.S. 12

A landmark case in which the Court declared it a violation of the Fourteenth Amendment for a state court to deny appeal to an indigent by not furnishing him with a free transcript. Such an act, while not discriminatory on its face, was discriminatory in its operation on the basis of wealth.

1963 Douglas v. California, 372 U.S. 353

The principle of Griffin was extended to include the right of indigents to free counsel. "In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has."(355)

1966 Harper v. Virginia State Board of Elections, 383 U.S. 663

In outlawing a poll tax, the Court declared:

> [A] state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or the payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.(666)

The cumulative effect of these decisions has been to establish the principle that a man cannot be deprived of at least some of his basic rights on the basis of a lack of wealth. There is a strong analogy to questions involving education (assuming education to be a fundamental right or interest), and such analogies have been made in several important recent decisions by district and state courts. In the earliest of these, Hobson v. Hansen (1967), the District Court of the District of Columbia grouped poverty with race as a discriminatory classification when found to deprive children of an adequate education. The Court asserted a positive obligation on the part of the responsible government to rectify a situation in which both "racial minorities and the poor are denied equal educational opportunity [emphasis added]."[32] The specific problem of school district taxation and its relation to educational opportunity was addressed in Hargrave v. Kirk.[33] In striking down a limitation on local school district taxation by the state of Florida, the District Court invoked the "new equal protection" theory. One commentator notes:

> One possible interpretation of Hargrave is that a state cannot create classifications based on geography and wealth which result in unequal educational opportunities absent a compelling state interest. This rationale can be used to attack the school finance provisions of all states except Hawaii which has a single, state-wide school district. All financial schemes which rely upon local taxes have created classifications based on geography and wealth. If unequal educational opportunities can be shown to result from this classification, following Hargrave, the classification would be a denial of equal protection . . . . Hargrave, by correctly assuming that unequal education is a necessary result of a great disparity in expenditures, defines the first parameter of possible standards and provides a rationale to strike down classifications made for administrative convenience that create obviously unequal educational opportunities.[34]

This case also involves a treatment of the effect of geography as a classification. Several authors have discussed the question of geographical classification, basing their evaluation primarily on reapportionment decisions stemming from Baker v. Carr,[35] (1962) and Reynolds v. Simms[36] (1964). In Reynolds the Court said: "The resulting discrimination against those . . . living in disfavored areas is easily demonstrable . . . ."[37] In another issue involving geographical classification, the Court struck down in Shapiro v. Thompson (1969)[38] a law which required an indigent to be a state resident for one year prior to claiming state public assistance benefits. However, the classification appears less significant in these cases than the importance of the rights denied (suffrage and subsistence benefits), and the classification by geography is not itself invidious in the same sense as a classification by race or wealth. Thus, in the educational opportunity cases geographical classification has been mainly seen as a de jure state action with the important secondary effect of producing a de facto oppressive classification by wealth.

The outstanding recent case in the field of equal educational opportunity is Serrano v. Priest, decided by the California Supreme Court in August, 1971. This decision represents, in one sense, the culmination of the new equal protection doctrine as applied to wealth and education. Here the suspect classification is declared to be wealth, and the fundamental interest adversely affected to be education; in the face of these two components, the state is found to have no compelling interest which requires maintenance of the classification:

> We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.[39]

In reasoning the case in terms of the new equal protection doctrine, the California Court provides a step-by-step analysis of the components of the test. Under the heading "Wealth as a Suspect Classification," the Court carefully develops an argument similar to the one described above, relying on the thesis developed in Harper, Griffin and Douglas. In these cases, the Court says, classifications by wealth, although "unintentional," were found to be "classifications whose impact simply fell more heavily on the poor."[40] Moreover, the Serrano Court finds that school district classifications are not simply the source of de facto discrimination, but, to the contrary, "we find the case unusual in the extent to which governmental action is the cause of the wealth classifications."[41] The opinion blames school districting in California for inter-district differences of as much as 10,000 to 1 in assessed value per unit of average daily attendance. And this, the Court holds, is clearly governmental discrimination in education on the basis of wealth.[42]

The second leg of the argument is made by the Court under the heading "Education as a Fundamental Interest."[43] The Court admits that education has not specifically been designated a "fundamental interest" by the United States Supreme Court, but concludes on the basis of Brown v. Board of Education and of its own reasoning that education is indeed such a fundamental interest:

> We . . . begin by examining the indispensable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life . . . . Thus, education is the lifeline of both the individual and society.[44]

Moreover, in comparing the right to an education with the right to vote or the right to the right of a criminal defendant, the Court concludes that, "from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer," and that "education makes more meaningful the casting of a ballot."[45]

The court finds that the existence of viable alternative systems of educational financing negate any compelling state interest in retaining the present system. Thus fulfilling the equal protection test's three criteria (wealth as a suspect classification, education as an adversely affected fundamental interest and the absence of a compelling state interest to require maintenance of the classification) the Court holds the financing system unconstitutional:

> The California public school financing system . . . since it deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find that such financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite "strict scrutiny", it denies to the plaintiffs and others similarly situated the equal protection of the laws.[46]

Soon after the Serrano decision, two federal district courts ruled against similar school financing schemes in Minnesota and Texas[46a] Nineteen challenges to school financing systems are pending in the courts and at least twelve more are in preparation. As a result of attacks on local financing systems under the new equal protection interpretation of the Fourteenth Amendment, it seems safe to say that massive changes are under way in the traditional methods of financing education in the United States.

Two fundamental questions arise in considering alternative financing plans to meet the new equal protection requirements: (1) How can the cost burdens best be equalized? (2) What constitutes educational equality? In answer to the first question, statewide rather than local financing would appear to meet the necessary requirements of an equalized burden; this most likely would take the form of either a statewide property tax or a fully equalized foundation program--or some combination of the two. Hawaii already has such a state-based system of financing; similar plans are under study in almost all states. Alternatively, approximate equality of tax burden might be achieved by the redrawing district lines, as required in a recent District Court decision in Virginia (to achieve both greater racial and financial equality among schools in the Richmond area)[47] or by going to a nationalized financing scheme. The primary source of funds in all of these plans could remain property taxation, as it is at present, or it could be shifted to income, sales or other forms of taxation. The chapter on educational financing in this study considers the alternatives in greater detail.

The second question, "What constitutes educational equality?," raises the difficult issues of distribution and assessment of educational need. Aside from the problem of relative tax burdens, there remains the dilemma of determining relative needs. An important challenge to the existing school finance system in Illinois failed primarily because of the plaintiff's reliance on the rather vague concept of "educational need."[48] The district court found this concept too "nebulous" for the application of judicial standards. However, the Serrano Court, while not equating expenditure exactly with quality, placed the burden on the defendants to show that "substantial disparities" in spending do not in fact create educational disadvantages in poorer districts.[49] Moreover, a large number of possible criteria for the assessment of need and corresponding distribution mechanisms have been suggested by various analysts.[50] The problem appears to be not one of whether there are standards, but of which standards to select.

The simplest "equal" distribution plan, of course, is a uniform per student or per capita allotment for an entire state. However, this ignores the expenditure-quality relationship, varying educational needs and questions of effort. In the first case, Coleman and others[51] have suggested that educational expenditures may have only a weak relationship to educational quality, and, since equal quality is what is finally desired, the state must base its equalization scheme on some basis other than expenditures. Secondly, educational needs vary (for example, schools may cost more to run in remote areas or in cities) and therefore some factor of need or cost should be taken into account in an equalizing plan. Third, the effort a family or a district is willing to give to provide an education may vary from place to place, and this, some argue, should be given recognition in the form of increased allotments for increased local tax effort. A number of plans to meet these criteria have been proposed, including "family power equalizing," vouchers, cost-pegged expenditures, classification of schools (with varying amounts to go to different kinds of schools), high minimum foundation programs and so on. A consideration of the merits and demerits of these various distribution schemes appears in the chapter on educational financing in this study.

MONTANA: STATUS AND ALTERNATIVES

Three fundamental decisions relevant to equal educational opportunity pose themselves to the Constitutional Convention: (1) the inclusion or noninclusion of a statement of principle regarding equal educational opportunity; (2) provisions on educational financing; (3) Indian education.

1. Statement of principle. The first explicit provision

on equal educational opportunity was included in the proposed New York state constitution of 1967:

> Equality of educational opportunity shall be guaranteed to all the people of the state. The Legislature shall provide necessary programs to develop the educational potential of each person. [Art. IX, Sec. 1C]

A similar provision could be included in the Montana Constitution, either in an education article or in the Bill of Rights. The arguments against inclusion of such a provision rest primarily on desire for constitutional brevity and potential difficulties in interpretation. The major arguments for inclusion, on the other hand, are that such a provision would provide a general statement of aim for the entire educational system, including its methods of financing, and that recent court decisions on the subject of equal protection have made such a statement of principle pertinent at this time, whereas it was not before.

The present Montana Constitution has no provision dealing either with equal protection of the laws or with equal educational opportunity. However, four sections of Article XI do suggest that the state is committed to maintaining some minimal equitable standard of education:

> It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform, and thorough system of public, free, common schools [emphasis added]. [Art. XI, Sec. 1]
>
> Ninety-five per centum (95%) of all the interest received on the school funds of the state, and ninety-five per centum (95%) of all rents received from the leasing of school lands and of all other income from the public school funds shall be apportioned annually to the several school districts of the state in proportion to the number of children and youths between the ages of six (6) and twenty-one (21) residing therein respectively, but no district shall be entitled to such distributive share that does not maintain a public free school for at least six months during the year for which such distribution is made . . . . [Art. XI, Sec. 5]
>
> It shall be the duty of the legislative assembly to provide by taxation, or otherwise, sufficient means, in connection with the amount received from the general school fund, to maintain a public free common school

> in each organized district in the state, for at least three months in each year. [Art. XI, Sec. 6]
>
> The public free schools of the state shall be open to all children and youth between the ages of six and twenty-one years. [Art. XI, Sec. 7]

One other section prohibits discrimination in admissions to educational institutions on the basis of religion, political party or sex, but says nothing of race or wealth; nor does it mention equality:

> No religious or partisan test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student . . . nor shall any person be debarred admission to any of the collegiate departments of the university on account of sex. [Art. XI, Sec. 9]

The Convention could (1) leave the present provisions in the Constitution unchanged; (2) condense them into a single general provision on equal educational opportunity and/or non-discrimination in education (assigning other topics in these provisions to the relevant sections); (3) modify particular parts of the existing provisions in accordance with desired changes, perhaps with respect to age, school terms and distribution schemes; or (4) strike all of the existing provisions, or all of the existing provisions with the exception of Section 1.

2. Educational financing. The basic means for the attainment of equal educational opportunity, other than through non-discrimination provisions, is through equitable financing schemes. The pros and cons of particular schemes are discussed later; the prior, more general question is what sort of constitutional language is required to allow creation of a more equitable financing plan than that now employed.

Under the present School Foundation Program, Montana attains a significant amount of equalization of distributed funds and some equalization of tax burdens. However, substantial differences in expenditures remain; some districts in Montana have as much as three times more to spend per pupil for elementary schools and nine times for high schools than do others.[52] Enormous differences also exist in taxable valuation per pupil; the ratio is 120 to 1 among some districts and 13 to 1 between the richest and poorest counties.[53] As a result, some counties must tax their citizens more than twice as much as others for schools which still are less well supported than those in rich counties. One study rates Montana thirtieth among the states in the degree to which its school foundation program actually equalizes.[54] Another study finds that in Montana if educational funds were distributed equally among all classrooms, more than half of the classrooms would receive additional money.[55]

Some changes in the direction of greater equalization could be accomplished in Montana without any constitutional change. Sections 1 and 6 of Article XI (cited above) clearly establish the duty of the state legislature to provide funds for local schools through taxation and other means. In addition, Article XII, Section 1a grants authority to the legislature to modify the source of taxation for schools:

> The legislative assembly may levy and collect taxes upon incomes of person, firms and corporations for the purpose of replacing property taxes. These income taxes may be graduated and progressive and shall be distributed to the public schools and to the state government.

However, a constitutional change would be required if one important alternative financing plan were implemented: a statewide property tax. Article XI, Section 9 of the Montana Constitution limits the rate of a state property tax to two and one-half mills:

> The rate of taxation on real and personal property for state purposes, except as hereafter provided, shall never exceed two and one-half mills on each dollar of valuation . . . .

A uniform statewide system of property taxation, however, would require a levy at a rate of at least forty mills and probably more, if it were to support schools at approximately the present level. Thus, this limitation would have to be substantially raised or eliminated altogether in order to establish the new system.

The existing constitutional provision on distribution of a portion of the school funds [Art. XI, Sec. 5] also might have to be changed or elminated should a new distribution system be desired. Under this provision, part of the state educational funds (interest from the permanent school fund and income from school lands) must be distributed on a strict per capita basis. This is an "anti-equalizing" device under the present system of district funding which enriches poor and rich districts alike; it is a type of flat grant criticized by some educational economists.[56] Moreover, to the degree that cost-quality factors and considerations of educational need should be taken into account, such per capita distribution also fails to meet standards of equity.

If it desired to change the existing provision with respect to concerns for equal educational opportunity, the Convention could either eliminate Article XI, Section 5 completely, modify it to contain additional factors of distribution and need or replace it with a new provision which specifies a general aim of equality in distribution.

A provision drafted by the Committee on Education of the Illinois Constitutional Convention was designed to achieve the goal of equalizing the financial burdens and benefits of education:

> To meet the goals of Section 1, substantially all funds for the operational costs of the free public schools shall be appropriated by the General Assembly for the benefit of the local school districts. No local governmental unit or school district may levy taxes or appropriate funds for the purposes of such educational operation except to the extent of ten percent (10%) of the amount received by that district from the General Assembly in that year.[57]

The Convention, however, chose to adopt only a general commitment to state support, omitting the 10 percent limitation on local funding. The new Illinois Constitution [Art. X, Sec. 1] provides: "The State has the primary responsibility for financing the system of public education."

3. Indian Education. The well-documented disadvantages suffered by Indians in educational matters[58] bring the topic of Indian education under the scope of a treatment of equal educational opportunity. However, in addition to educational disadvantage, other important factors, such as the federal relationship to Indian tribes and cultural integrity, complicate a discussion of Indian education. Therefore, this topic is analyzed at greater length below.

INDIAN EDUCATION: BEYOND THE MELTING POT

A report by the United States Senate has labeled Indian education a "national tragedy."[59] Detailed studies of the failures of both federal and state governments to develop even minimally successful educational programs for Indians are almost as numerous as the failures themselves.[60] One such study, the Carnegie Report, states the case baldly:

> 1. The education provided Indian children is a failure when measured by any reasonable set of

> criteria. The educational system has not succeeded in providing a majority of Indian children with the minimum level of competence necessary to prepare them to be productive citizens in a larger society. Addiitionally, very little attempt has been made to perpetuate the values and culture that might be unique to the Indian people, provide them with a sense of pride in their own heritage, or confidence that they can effectively control their own future development. It should be noted that the fault for these inadequacies in education does not lie entirely within the school; the whole system of relationships between the white majority community and the Indians is the source of the problem. While the schools, both public and Bureau of Indian Affairs supported, are in great need of improvement in curriculum, methods, teacher training, teacher turnover, and in the teacher's understanding of the unique problems of the students and their parents, any increase in money, time, and effort spent on Indian education can only relieve some of the more important symptoms of the underlying problem. These efforts will be relatively ineffective unless the basic relationships between Indians and white people can also be altered, and, specifically, unless the paternalistic relationship between the white power structure and the Indian community can be changed.
>
> 2. The crucial problem in the education of Indian children is the general relationship between white society and the Indian people. This relationship frequently demeans Indians, destroys their self-respect and self-confidence, develops or encourages apathy and a sense of alienation from the educational process, and deprives them of an opportunity to develop the ability and experience to control their own affairs through participation in effective local government.[61]

Such studies develop a picture of unequal educational opportunity of classic proportions: A racial minority with among the lowest average income ($1,500 annually per family for on-reservation Indians)[62] and the highest unemployment rate (37.3% for on-reservation Indians in 1967)[63] of any social group must send their children to the lowest quality schools in the country. Moreover, in addition to purely economic factors, Indian education is fraught with problems of a psychological and cultural nature. The results are enormous drop-out rates (as high as 50 percent in some areas)[64] and perpetuation of economic and cultural deprivation.

At least part of the problem appears to result from a lack of clear governmental responsibility for Indian education. This, in turn, results from the traditional haziness of law which surrounds state-federal relationships with Indians. The early landmark case in this area was Worcester v. Georgia,[65] in which the Court ruled, in an opinion delivered by Chief Justice Marshall, that the federal government had exclusive jurisdiction over Indian tribes on Indian lands. In 1858, on the other hand, the Court ruled that the state of New York had police powers over its own citizens on Indian lands.[66] The trend, however, has been toward the primacy of federal authority in Indian affairs and the eventual holding in United States v. Forness (1942) that, without the express consent of Congress, state laws do not apply to Indians on reservations.[67]

The issue is further complicated by the lack of clarity in the federal government's own claim to jurisdiction over Indians. Part of the confusion stems from the federal Constitution's grant of power to Congress "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes" [Art. I, Sec. 8], which suggests a view of Indian tribes as sovereign states, rendered subject to the power of Congress by conquest.[68] Chief Justice Marshall reinforced this view in terming the Indian tribes "domestic dependent nations" and "wards."[69] One author describes the twisted course of subsequent legal doctrine on the Indian:

> The term "ward" became something of a catchword for later Supreme Court decisions, so that, in United States v. Waller [243 U.S. 452 (1917)], the Court felt free to speak indiscriminately about the power of Congress to grant the Indians varying degrees of emancipation at its pleasure. The federal courts in one breath would describe Indian tribes as sovereign nations or states, and in the next designate them wards of the Government, who had to be treated as the beneficiaries in a trustee relationship with the Government. They could not manage their own property, which they had held for thousands of years; they could not manage their own health or welfare services; they could not even provide education for their children, so that treaty after treaty contained provisions for Government schools. Thus, the Indians were separate, and quasi-equal; they were citizens as well as wards, residents as well as aliens; they could vote and serve in the armed forces, but they could not serve on local school boards because they were not part of a town or school district. They did not pay taxes on the land on which they lived, but they paid income taxes on money they earned. They seemed to straddle a fence

> along an uneasy border between two worlds. [Citations omitted].[70]

Significantly, Indians did not receive formal citizenship until a Congressional Act of 1924.[71] (Further discussion of the legal relationships among the nation, the states, and Indians appears in the study on the Bill of Rights in this series of reports for the Montana Constitutional Convention.)

It is not surprising, then, that the state's relationship to Indian education is ill-defined. While authority over Indians is in the first instance federal, the state has the primary authority for education of its inhabitants. More than 60 percent of all Indian children attend state schools.[72] States receive federal support for the education of reservation Indians, but the major sources of this support ("Federal impact" aid under Public Laws 815 and 874) are not specifically directed to Indians.[73] In practice, states appear to have assumed a major amount of responsibility for educating Indians without ever formally accepting the task. Such de facto arrangements often have merit, but they also can lead to negligence.

Thus, one area of possible constitutional action with respect to providing equal educational opportunity for a heavily disadvantaged minority might be inclusion of a provision clarifying the state's responsibility with respect to Indian education. The New Mexico Constitution [Art. XII, Sec. 10] has such a provision covering children of Spanish descent:

> Educational rights of children of Spanish descent. Children of Spanish descent in the State of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the State, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the State, and the legislature shall provide penalties for the violation of this section . . . .

There are other factors, however, which qualify the state's relationship to Indian education. The assumption of responsibility by the state for Indian education is not an unmitigated blessing for the Indian. The particular cultural and historical factors involved in Indian affairs demand that special consideration be given to cultural autonomy. Indians have been belabored for centuries with the white man's attempts to "assimilate" them into the "dominant culture." Comments made by Thomas Jefferson on the Indians sound quite as jarringly chauvinistic as the words of the Supreme Court on another racial minority (cited above in the Dred Scott decision). Jefferson said:

> [T]he Indians backward [in civilization] will yield, and be thrown further back. They will relapse into barbarism and misery . . . and we shall be obliged to drive them with the beasts of the forest into the Stony Rocky mountains.[74]

In the face of the movement toward their domination and absorption by the European settlers, Indians have maintained an amazing degree of cultural integrity. One of the main vehicles for the "acculturation" of the Indian by the white civilization has been the school system, and many writers have suggested that Indian resistance to this process is responsible for the educational dilemma. One particularly articulate statement of this point is by Lloyd New, director of the Institute for American Indian Arts:

> For almost five centuries the American Indian has been subjected to a process of attrition which has slowly eroded the roots of his cultural (and economic) existence. His physical ways have been completely obliterated in many areas and, presently, his spiritual existence is in extreme jeopardy.
>
> The many and varied attempts that have been made to "help" him, and particularly "educate" him, have been largely unsuccessful.
>
> Perhaps in part because it was assumed that the sooner the Indian was forced to abandon his ways and join the melting pot of America, the better off he would be. But he has displayed unique resistance to that idea, possibly because his psychological relationship to the land was different from that of the immigrant groups who eventually surrounded him. Failure on the part of those who have dealt with the Indian to understand the basis of his tenacious observance of his own cultural mores has resulted in the abortion of almost every attempt to assist him. Even now, various kinds of human salvage operations, such as urban relocation, employment assistance, on-the-job training, and other rehabilitation efforts are, at best, only stopgap efforts to meet his worldly needs, while failing miserably to provide the cultural and emotional substance required to put his life in balance.
>
> The American Indian has always been devoted to a philosophy which holds that one's existence should blend into the comparatively passive rhythms of nature, as opposed to the dominant society's quest for control of nature

> through scientific manipulation of its elements. In the main, direct attempts to switch him from his philosophical position have failed, much to the consternation of those who have tried.
>
> In the past, public apathy and disinterest permitted him to maintain a certain degree of privacy in this way of life but in recent times he has been forced into the public struggle for economic survival, due to the lack of an environment supportive of his old ways. With limited land holdings and the inevitable encroachments of the dominant society the American Indian is hard pressed in his efforts to maintain his viewpoint while adjusting to the exigencies of the modern world.
>
> No longer in a position to make war with the opposition, the Indian, in general, has adopted a tendency to withdraw and lie quietly in the remnants of his old world, only halfheartedly picking at the offerings made to him by his multitudinous and dominating neighbors.
>
> Poverty, poor health, unemployment, and a growing rate of alcoholism among Indian adults, and a shocking prevelance of suicide, dropouts and delinquency among Indian youth attest to the fact that there has been an overall failure to provide an educational approach sufficiently effective to promote constructive social transition.[75]

The Indian has a great deal to protect in his own cultural integrity. Thus, while he may require aid in some forms from white society, he does not necessarily want the control which seems inevitably to accompany institutional support. In educational matters, this relates to the right to retain cultural autonomy and educational diversity discussed in connection with other minority groups in Chapter III. Among such groups, one writer argues,

> the American Indians, by virtue of their occupation of a unique position in the history and legal scheme of the United States, have the best claim to "unique" treatment, with regard to education. The documentation of past and present physical oppression, violent coercion, enslavement, and social stigmatization is quite as lurid as that which obtains for the Negro, while the tactics used to "civilize" the Indians, under the rubric of "education," are more blatantly repugnant than those employed against other groups.[76]

The argument discussed in the previous chapter in support of educational diversity thus would hold doubly true for Indian education. The U.S. Supreme Court's holding in Priest v. Society of Sisters[77] that the state does not have the right to "standardize" its children would seem to reinforce claims for the protection of a truly distinct cultural minority. Similarly, the cultural considerations articulated in the Amish school cases have bearing on the analogous requirements for Indian cultural autonomy.

The special circumstances surrounding the Indian peoples, however, lend even greater support to claims voiced for protection against dominant social institutions. The Montana Supreme Court recognized such a right of independence in an 1881 ruling upholding the right of Indians to consent or not to consent to government-provided education. The case concerned an 1819 federal statute as it applied to a treaty with the Blackfoot Indians providing for a government school on the reservation. The Court held that Indian parents could not be compelled, by a writ of habeas corpus, to send their children to the school.

> The treaty and statute daily illustrate the policy of the government towards the Indians. The purpose is to civilize and educate them. But the government does not assume to force upon the Indians an education, nor to compel them to adopt the modes of civilized life. The fundamental idea is that whatever is done in the premises must be by consent of the Indians.[78]

A later federal statute, the Wheeler-Howard Indian Reorganization Act of 1934, provides another means of securing a measure of tribal autonomy. The Act allows Indian tribes to incorporate as governing bodies and business entities. The tribal council or tribal government becomes the duly constituted governing body for those tribes which do incorporate, and because the constitutions of some of the incorporating tribes expressly provide for tribal control of education, such an act of incorporation opens the door to complete tribal authority over education. Under these provisions, a tribe might choose to withdraw its consent to federal and state education laws and substitute a school system of its own choosing.[79]

Although severe financial obstacles stand in the way of such developments, there are good reasons for the attempts to protect Indian cultural integrity in some manner. The history of the white man's attempts to "acculturate" the Indian through educational indoctrination has included intense efforts to absorb and mold the Indian's character. One former teacher in an Indian boarding school in the 1920's obliviously recounts her difficulties with language training:

> Among all Indian tribes there is the universal and decided aversion to using the English language. Even those who have been at school and who understand and speak it well will often call for an interpreter when summoned to the agency on business or to answer charges brought against them.
>
> In the more remote schools one of the trials of a teacher's life was to get her pupils to speak out, or to talk loudly enough when reciting, to be heard. In these places it sometimes became necessary to punish children for using their own language while at play or while engaged in outside work. If this was not done, there was no progress at all made in acquiring English, and if the children did not know English, all attempts at teaching them were useless.[80]

A modern version of this attempt to impress the Indian into a single cultural mold is found in a recent report by an analyst in the Indian section of the Office of Economic Opportunity:

> Well, then, why don't we put into practice some of our psychological knowledge about human beings and proceed with a plan of deliberate conditioning for specific purposes. First, we must decide as members of the dominant culture what we want of these Reservation Indians and then, secondly, we must draw our plans, and third, proceed without hesitation to shape the behaviors which in combination will give us the kind of people we want.[81]

Crass attempts, such as these in federal schools, to erase the distinctiveness of Indian culture often have been matched by a kind of demeaning neglect of the Indian in public schools. The Senate Report on Indian Education lists major problems of Indian participation in the public school system:

> 1. American Indians have little, if any, influence or control in the education of their children in the public schools.
>
> 2. Public schools educating Indians rarely include coursework which recognizes Indian history, culture or language, and often use materials and approaches which are derogatory toward Indians.
>
> 3. Many school administrators and teachers consider Indian pupils inferior to white students, and thus expect them to fail, both in school and in life.[82]

A report on Indian education just completed by an educational research group at the University of Montana levels similar criticisms at the treatment of Indian students in the public school system:

> The handicap from which Indian children suffer most is that usually the off-reservation public school is too busy following the state adopted curriculum and meeting the needs of all students to make the adaptations necessary to meet the needs of the non-English speaking Indian child who is already behind his group in knowledge of how to study and in comprehension.[83]

What are the alternatives to the traditional federal and state patterns of assimilative Indian education? Three of the most widely acclaimed are Indian-run demonstration schools developed recently in New Mexico, Arizona and Montana. The primary emphasis in these schools is community control and the provision of an education germane to the Indian experience. Although the highly successful Rough Rock school in Arizona is probably the best known, the newly created school on Montana's Rocky Boy's Reservation demonstrates the workability of an imaginative approach to Indian education in Montana. After several years of frustrated efforts, the Rocky Boys finally were able in 1970 to establish an independent public school district under their own control. In place of their previous submersion in a school system run by an all-white board, which Indians felt ignored some of their important needs, the tribe now has a school which they feel is more in tune with their own cultural heritage. Bert Corcoran, the Cree principal of the new school, describes the difference:

> We are a community school. We serve the community. That is the basic difference from the old system. The school here is a community center. It stays open five nights a week. We have 41 adults in a basic education course. We've got a bilingual program in Cree and English that ranges from adults down to five-year-olds with teaching done by people from the reservation. This is no longer an institution. I like that because I'm not an institution man. The school is for the people. It's their school and they know it. They're no longer afraid.[84]

The major remaining concern of the school is its heavy reliance on federal financial support. Under various special grants, the federal government provides more than half of the operating expenses of the school. The tribe is continuing its effort to place the school on a secure financial footing.

EQUAL EDUCATIONAL OPPORTUNITY

The trend is toward an increasing responsibility assumed by the state for the education of Indians. In California, Idaho, Michigan, Minnesota, Nebraska, Oregon, Texas, Washington and Wisconsin, the state has taken over total responsibility for Indian education from the federal government. In view of this trend, schools such as the Rough Rock and Rocky Boy assume major significance as models for state programs--schools which provide the alternative of state assistance without state domination. Three main goals for state activity in Indian education emerge from experience with such schools and from similar conclusions arrived at in many studies of Indian education. States have the obligation to (1) provide equal educational opportunities for Indian children through adequate financial support; (2) eliminate all forms of discrimination against Indians in education, and (3) allow for the existence of schools which meet the indigenous cultural needs of Indians, by fostering educational diversity and community control.

These statements of principle could be embodied in a model constitutional provision on equal educational opportunity and Indian education.[85] Although no other state has such a provision with respect to Indians, a precedent does exist in a provision for another minority group in the New Mexico Constitution, as cited above.

The major arguments in favor of the inclusion of such a constitutional provision are:

1. A constitutional commitment to equal educational opportunity should be made in light of the fundamental character of both education and the rights of equal protection; explicit reference to the Indian people is warranted by their special legal status and long history of deprivation.

2. The confused status of federal and state authority with respect to Indian education demands constitutional clarification.

3. The historic culture of the Indian, threatened by the modern state, requires specific constitutional protection.

4. Education, as a specifically state responsibility, should have the major conditions of its provision established in the state constitution.

Major arguments against inclusion of such a provision include:

1. For the sake of brevity, the state constitution should not give specific reference to the topic of equal educational

opportunity. Equal protection provisions of the federal Constitution extend to the state.

2. The special relationship of the Indian to the federal government (i.e., as a "ward") precludes state action in this area.

3. The principle of generality militates against the mention of particular groups in a constitution.

4. No other state has a similar provision.

CHAPTER IV

NOTES

1. Christopher Jencks, "Is the Public School Obsolete?" *The Public Interest* 1 (1966):18

2. See, for instance, James Coleman, *et al.*, *Equality of Educational Opportunity*, United States Office of Education publication (Washington, D.C.: U.S. Government Printing Office, 1966) (cited hereafter as Coleman, *et al.*, *Equality of Educational Opportunity*) and *Racial and Social Class Isolation in the Schools*, ed. Robert P. O'Neilly (New York: Praeger, 1970).

3. *Ibid*. and Arthur E. Wise, *Rich Schools Poor Schools: The Promise of Equal Educational Opportunity* (Chicago: University of Chicago Press, 1968), cited hereafter as Wise, *Rich Schools*; John E. Coons, William H. Clune III and Stephen D. Sugarman, *Private Wealth and Public Education* (Cambridge, Mass.: Harvard University Press, 19700, (cited hereafter as Coons *et al*. *Private Wealth*); and James B. Conant, *Slums and Suburbs* (New York: McGraw-Hill, 1961).

4. This is the formula extracted from utilitarian theory by Isaiah Berlin in "Equality as an Ideal," *Justice and Social Policy* (Englewood Cliffs, N.J.: Prentice Hall, 1961), p.128. Cited hereafter as Berlin, "Equality."

5. Cf. Berlin, "Equality" and Richard Wollheim, "Equality and Equal Rights," *Justice and Social Rights*, ed. Frederick A. Olafson (Englewood Cliffs, N.Y.: Prentice-Hall, 1961), pp. 111-127. Cited hereafter as Wollheim, "Equality."

6. Wollheim, "Equality," p. 112.

7. *Dred Scott v. Sandford*, 19 Howard 393 (1856).

8. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

9. *Cumming v. County Board of Education*, 175 U.S. 528 (1899).

10. George J. Collins, "Constitutional and Legal Basis for State Action," *Education in the States: Nationwide Development Since 1900*, ed., Jim B. Pearson and Edgar Fuller (Washington, D.C.: National Education Association), 1969), p. 54.

11. *McLaurin V. Board of Regents*, 339 U.S. 637, 641 (1950).

12. *Brown v. Board of Education*, 347 U.S. 483 (1954).

13. Brown V. Board of Education, 349 U.S. 294 (1955).

14. Brown, 347 U.S. 483, 494-5.

15. Ibid., 492-3.

16. Philip B. Kurland, "The Supreme Court, 1963 Foreword, Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," Harvard Law Review 78 (1964): 144. Cited hereafter as Kurland, "Equal in Origin."

17. F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

18. Kenneth L. Karst, "Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula," U.C.L.A. Law Review 16 (1969): 716, 739, as adapted by Paul A. Brest, "Interdistrict Disparities in Educational Resources," Stanford Law Review 23 (1971): 602. Cited hereafter as Brest, "Interdistrict Disparities."

19. Shapiro V. Thompson, 394 U.S. 618, 651 (1969).

20. Frank I. Michelman, "The Supreme Court 1968 Term: Foreward: On Protecting the Poor Through the Fourteenth Amendment," Harvard Law Review 83 (1969): 19-21, cited hereafter as Michelman, "On Protecting the Poor;" Wise, Rich Schools, pp. 23-44.

21. Brown, 349 U.S. 294, 298 (1955).

22. Kurland, "Equal in Origin," p. 148.

23. Bell v. School City of Gary, 377 U.S. 924 (1964).

24. Balabin v. Rubin, 199 N.E.2d 375, 14 N.Y.2d 193, 250 N.Y.S.2d 281 (1964); Addabbo v. Donovan, 256 N.Y.S.2d 178 (1965).

25. Green v. County School Board, 391 U.S. 430, 437-8 (1968).

26. Swann v. Charlotte-Mecklenburg Board of Education, 91 S. Ct. 1267 (1971).

27. Swann v. Charlotte-Mecklenburg Board of Education, 300 F. Supp. 1358, 1360 (W.D.N.C. 1969). A similar ruling by the United States Supreme Court, which described the state's obligation for positive action to overcome segregation created by neighborhood school zoning, maintained, "As we have held, 'neighborhood school zoning,' whether based strictly on home-to-school distance or on 'unified geographic zones,' is not the only constitutional remedy nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the

district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones . . . . The measure of any desegregation plan is its effectiveness. Davis v. Board of School Commissioners, 91 S.Ct. 1289, 1292 (1971).

28. Wise, Rich Schools, pp.3-92, 163-193; Robert L. Carter, The Rights of Americans: What They are--What They Should Be, ed. Norman Dorsen (New York: Random House, 1971).

29. Michelman, "On Protecting the Poor," pp. 8-10, 20-21; Brest, "Interdistrict Disparities," pp. 603-604.

30. Griffin v. Illinois, 351 U.S. 12 (1956).

31. Wise, Rich Schools, pp. 3-92; Philip B. Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," University of Chicago Law Review 35 (1967-68): 584-588; "Constitutional Law: Florida Limitation on Local Property Tax Rate for Education Violates Equal Portection," Duke Law Journal 1970: 1033. Cited hereafter as "Constitutional Law," Duke L.J.

32. Hobsen v. Hansen, 269 F. Supp. 401 (D.C.D.C. 1967).

33. Hargrave v. Kirk, 400 U.S. 900, 313 F. Supp. 944 (1970).

34. "Constitutional Law," Duke L. J., p. 1039.

35. Baker v. Carr, 369 U.S. 186 (1962).

36. Reynolds v. Simms, 377 U.S. 533 (1964).

37. Ibid., p. 563.

38. Shapiro v. Thompson, 394 U.S. 618 (1969).

39. Serrano v. Priest, 96 Cal. 601, 487 P2d 1241, 1244.

40. Ibid., p. 1253.

41. Ibid., p. 1254.

42. Ibid., pp. 1246, 1247-8, 1251-2.

43. Ibid., p. 1255.

44. Ibid., pp. 1255-56.

45. Ibid., pp. 1257-8.

46. Ibid., 1263.

46A. Rodriguez v. San Antonio Independent School District, 40 L.W. 2398 (1971). The U.S. District Court of West Texas held: "more than mere rationality is required . . . . to maintain a state classification which affects a 'fundamental interest' or which is based upon wealth. Here both factors are involved."

The court applied a principle of what it termed "fiscal neutrality:"

"Briefly summarized, this standard [of fiscal neutrality] requires that the quality of public education may not be a function of wealth, other than the wealth of the state as a whole."

In the Minnesota case, Van Dusartz v. Hatfield, 40 L.W. 2228 (1971), the court held: "While the correlation between expenditure per pupil and the quality of education may be open to argument, the court must assume here that it is high. To do other wise would be to hold that in those wealthy districts where the per pupil expenditure is higher than some real or imaginary norm, the school boards are merely wasting the taxpayers money."

47. Discussed in Tom Wicker, "More Problems," The New York Times News Service, The (Helena) Independent Record, January 14, 1972, p. 4.

48. McInnis v. Ogilvie, 394 U.S. 322 (1969).

49. Serrano v. Priest, pp. 1251, note 14, p. 1253, note 16, pp. 1264-1265.

50. Wise, Rich Schools, pp. 121-214; Coons et al., Private Wealth, pp. 245-254, 469-473; John E. Coons and Stephen D. Sugarman, "Family Choice in Education: A Model State System for Vouchers," California Law Review 59 (1971): 321. Christopher Jencks, "Is the Public School Obsolete?" The Public Interest 1 (1966): 18-24; Judith Areen, "Education Vouchers," Harvard Civil Rights Review 6 (1971): 466; National Educational Finance Project, Alternative Programs for Financing Education, Vol. 5 of 5 vols. (Gainesville, Florida: 1971) pp. 133-172, 231-264; cited hereafter as NEFP, Alternative Programs.

51. Coleman et al., Equality of Educational Opportunity, pp. 21-22.

52. Montana Education Association, 1967-68 Tax and Budget Data: Montana Town Schools (Helena, 1968), pp. 8, 19.

53. Montana Education Association, Here's How It Works: An Explanation of Montana's Equalization Program (1970 Revision), (Helena, 1970), p. 3; cited hereafter as MEA, Here's How.

54. NEFP, *Alternative Programs*, p. 250.

55. Wise, *Rich Schools*, pp. 201-202.

56. See, for example, Coons *et al*., *Private Wealth*, pp. 38-199, 474-478.

57. Illinois, Constitutional Convention of 1970, *Sixth Illinois Constitutional Convention Committee on Education Proposal Number 2* (April 14, 1970), Art. VIII, Sec. 4, as proposed by Committee.

58. United States Senate, Special Subcommittee on Indian Education, *Indian Education: A National Tragedy--A National Challenge*, Report No. 91-501 (Washington, D.C.: U.S. Government Printing Office, 1969); cited hereafter as U.S.S., *Indian Education, 1969*. Rosalie and Murray Wax, "Indian Education for What?" *The American Indian Today*, ed. Stuart Levine and Nancy O. Lurie (Baltimore: Penguin, 1970), p. 257; Richard M. Ross, "Cultural Integrity and American Indian Education," *Arizona Law Review* 11, Pt. 2 (1969): 641. Cited hereafter as Ross, "Cultural Integrity.

59. U.S.S., *Indian Education*, 1969.

60. *Ibid*. and United States Senate, Special Subcommittee on Indian Education, *The Educaion of Americans: A Survey of the Literature* (Washington, D.C.: U.S. Government Printing Office, 1969).

61. Francis McKinley, Stephen Bayne and Glen Nimmicht, *Who Should Control Indian Education?* Berkeley, Calif.: Far West Laboratory for Educational Research and Development, 1969), p. 4. This report was funded by the Carnegie Corporation. Cited hereafter as McKinley et al., *Who Should Control*?

62. *Ibid*., p. 11.

63. United States Senate, Subcommittee on Indian Education, *Indian Education, 1969: Hearings Before the Subcommittee on Indian Education* (Washington, D.C.: U.S. Government Printing Office, 1969), p. 1593 (cited hereafter U.S.S., *Indian Education, 1969: Hearings*.

64. McKinley, *et al., Who Should Control*?, p. 11.

65. *Worcester v. Georgia*, 31 U.S (6 Pet.) 515 (1832).

66. *New York ex rel. Cutler V. Dibble*, 62 U.S. (21 How.) 366 (1858).

67. *United States v. Forness*, 125 F. 2d 928 (2d Cir. 1942).

68. Felix Cohen, *Handbook of Federal Indian Law*, 2d ed. (Washington, D.C.: U.S. Government Printing Office, 1958), p. 398, note 43.

69. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

70. Ross, "Cultural Integrity," p. 658.

71. Act of June 2, 1924, 43 Stat. 253.

72. U.S.S., *Indian Education, 1969: Hearings*, p. 1560.

73. There are three primary sources of federal support for Indian schoolchildren in public schools: P.L. 81-874, The Federally Impacted Areas Act (1950), P.L. 81-815, School Facilities Construction Act (1950), and the Johnson-O'Malley Act (1934). P.L. 81-874 and P.L. 81-815, which provide the largest share of support for Indian education, are designed to benefit children in areas affected by the existence of large amounts of federal (non-taxpaying) property. Indians are one group among a large number which are eligible for aid under these acts. Johnson-O'Malley funds are exclusively for Indians, but are restricted by Bureau of Indian Affairs policy to children whose parents live on or near reservations under the jurisdiction of the BIA.

74. Letter from Thomas Jefferson to John Adams, March, 1812, *The Jefferson Cyclopedia* (ed. J. Foley, 1900) as reprinted in *The Indian in America's Past*, ed. Jack Forbes (1964), p. 102.

75. Lloyd New, "The Failure of National Policy: An Historical Analysis," tesimony before the Senate Indian Education Subcommittee, U.S.S., *Indian Education, 1969*, p. 139.

76. Ross, "Cultural Ingegrity," p. 643, note 7.

77. *Priest v. Society of Sisters*, 268 U.S. 510, 534-5 (1925).

78. *United States ex rel. Young v. Imoda,* 4 Mont. 38, 44-45, 1 P. 721, 723 (1881).

79. Cf. Ross, "Cultural Integrity," p. 662.

80. Gertrude Golden, *Red Moon Called Me: Memoirs of a Schoolteacher in the Government Indian Service* (San Antonio, Texas: The Naylor Co., 1954), p. 83.

81 Wilson, "Social Reconstructionism and Indian Reservation Cultures," *Journal of American Indian Education* 5 (1965): 18, 21.

82. U.S.S., *Indian Education*, 1969, pp. 52-53.

83. Donald E. Hjelmseth and Lyle L. Berg, Individualization of Instruction: The American Indian Student (Missoula, Montana: Division of Educational Research, University of Montana, 1971), p. 1.

84. As quoted in "Indian Education: Community Control," Inequality in Education, No. 7 (1971): 9.

85. A provision in the Enabling Act for the Montana Constitutional Convention of 1889 might have some bearing on such a provision: "The constitution[s] shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence. [Section 4]"

There is some doubt as to the interpretation of this provision. The ambiguity of the language leaves unclear what is meant by "no distinction . . . . except as to Indians untaxed." Moreover the confused status of the legal relationships among Indians, the federal government and the state, as discussed earlier, compounds the difficulty of specifying Indian rights. Presumably, however, this language in the Enabling Act would pose no obstacle to a new constitutional provision relating to Indian equal educational opportunity.

CHAPTER V

PUBLIC AND NONPUBLIC EDUCATION

One of the most emotionally discussed issues in the field of education is the relationship between public and nonpublic education. The matters involved are so basic--individual rights, state powers, religious and moral beliefs, self-determination, public welfare, the shaping of children's lives, taxation--that any treatment of the issue is bound to stir fundamental moral and political beliefs. The problems centered around education, religion and the state form an essential part of the political heritage of the democratic polity, from the classical formulations in Socratic dialogues to the arguments of contemporary schools of political thought. The public-nonpublic education issue has become an intrinsic part of social life in the Western world.

Although the issue is often referred to as the "church-state" controversy, it is really a triangular affair comprising separate public, private and religious issues. The questions of the parental right to educate, the state obligation to provide education, and religious freedom are separate dimensions of the central problem surrounding the relationship between public and nonpublic schools. Each aspect must be kept separately in mind in examining the general issue.

This debate has ancient origins. Socrates allegedly was condemned to death for subverting the sanctioned state religion and morality by introducing Athenian youths to new notions of education.[1] Jesus, confronted with a similar dilemma between religious and moral principle and political sovereignty, uttered the famous dictum, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[2] The "two cities" doctrine of Augustine and the hierarchies of laws of Thomas Aquinas provided a modus vivendi between the competing allegiances of church and state in the Western world during the Middle Ages. With the post-Renaissance emergence of the secular state and the gradual growth of religious tolerance, the affairs of the state and those of the church became increasingly insulated from one another. Education, however, remained an area of vital concern which defied division. The mind of the child was too crucial a subject for state, church and parent to relinquish rival claims to influence over it.

This controversy between public and private claimants to the right to educate was inherited by the new American nation and became a part of its political culture. America the democratic state and America the pluralist society: The incipient conflict between these two national principles has been recognized since

Toqueville's brilliant analysis in Democracy in America. As **Toqueville pointed out, America has been unprecedentedly successful in combining pluralistic diversity with** democratic equality--yet, as he also warned, there lurked behind this compromise the opposing dangers of sectarian fragmentation and majority tyranny.[3] In the field of education these two principles have met head on, and each era has had to work out its own compromise.

In the contemporary era, the issue remains much the same: What should be the proper relationship between public and nonpublic education in order both to promote the public welfare and to safeguard freedom of conscience and diversity? How does state aid to private education relate to both public welfare and freedom of conscience?

Although general principles embodied in these questions have been articulated in federal and state constitutions, judicial and constitutional processes are required to resolve recurrent conflicts among them. A good deal of attention has been given by the courts in recent years to the problem of striking a balance among the principles of public welfare, individual rights and religious liberty.

The judicial and constitutional controversy has focused primarily on two points: regulation and state aid. The issue of state regulation of nonpublic schools is considered in Chapter III of this study, but the crux of the problem is summed up by Erickson:

> How can nonpublic education be both responsible and free? Responsible to serve the public interest; free to experiment and disagree. Without regulation, some schools may victimize patrons and endanger the general welfare. With regulation, dissent is jeopardized. Where should the balance be struck?[4]

Erickson recommends that courts and policy-makers, in weighing public welfare and diversity in decisions on school regulation, should keep two paramount objectives in mind: encouragement of the pursuit of pluralistic goals and encouragement of diverse approaches to achievement of these goals.[5] (For further discussion of the issue of regulation, see Chapter III.)

The question of state aid to nonpublic education poses even thornier problems than those associated with regulation. In addition to being immersed in the difficulty of balancing public welfare and diversity, the state aid issue is entangled with the problems of control of state funds and interpretation of the establishment of religion clause of the First Amendment to the federal Constitution. The basic argument goes something like this: On the one hand, public funds should not be used for religious or other nonpublic purposes. But, on the other hand, education is by its very nature a public purpose. The result is a precarious balancing act between relative injustices: the injustice of requiring a cultural minority to pay for schools for the public as well as for their own children versus the injustice of requiring the public to pay for doctrinaire schools for a minority. Clearly there is no simple legal solution. Law professor Philip Kurland comments on the state-aid issue:

> [A]nyone suggesting that the answer, as a matter of constitutional law, is clear one way or the other is either deluding or deluded.[6]

The following sections discuss the evolution of the current legal situation with respect to state aid to nonpublic schools and suggest the major alternatives for state constitutional provisions on the subject. The evolution is discussed primarily in national terms because the U.S. Supreme Court, in interpreting the supreme law of the land, sets the legal framework for subsequent state action. Existing provisions in other state constitutions together with other alternatives are to be treated in connection with Montana's provisions on the issue.

FEDERAL CONSTITUTIONAL INTERPRETATION: FROM THE WALL TO THE TIGHTROPE

In spite of the massive attention given the state-aid issue, only two U.S. Supreme Court decisions before 1971 dealt directly with the question of state aid to parochial schools. This was due primarily to the traditional state jurisdiction over the disposal of funds in educational matters. However, with increasing amounts of federal aid to education in more recent years, the issue has been elevated to the purview of federal concern.

The first of these two cases, Everson v. Board of Education, quickly became a landmark decision on the interpretation of the First Amendment. The relevant part of the First Amendment, extended to the states through the Fourteenth Amendment, reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

In Everson, the Court upheld public payment for bus transportation for students attending parochial and other nonpublic schools. Although the Court ruled by a 5 to 4 majority in favor of this particular aid program, Justice Black delivered an opinion for the Court which carefully delineated the meaning of the "establishment clause" of the First Amendment:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[7]

Yet despite its own elaborately drawn line beyond which state aid was not to pass, the Court ruled in favor of certain forms of aid, in this case for transportation. The reason is in the other part of the First Amendment, known as the "free exercise clause." The Court stated:

> [We] must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief . . . . [The first amendment] requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.[8]

The Everson case provided a clear exposition of the two countervailing principles embodied in the First Amendment. On the one hand, the establishment clause was held to create a "wall" between the affairs of the state and those of religion; on the other hand, the free exercise clause was held to dictate a policy of non-antagonistic "neutrality" in the state's relations with religious groups. The Court did not go so far as to maintain that the free exercise clause required the state to provide equal transportation aid to parochial students, but the majority opinion did hold that once the state legislature chose such a method to promote the public welfare, then it was constitutionally acceptable under both clauses.[9]

However, this was only the beginning of controversy. There was much disagreement in the Everson case on the constitutional questions involved. In a dissenting opinion, Justice Jackson pointed to the incongruity of the concept of a wall which was not really a wall and which had a precedent only in the literary figure Julia "who, according to Byron's reports, 'whispering "I will ne'er consent,"--consented.'"[10] And the subsequent history of the "wall" doctrine has been no more felicitous. Robert Hutchins points out that the phrase "the wall between church and state" was first used by the Court as borrowed from Jefferson in a completely different context.[11] Although referred to in one case as "impregnable," the "wall" has been more recently abandoned as a metaphor in favor of such terms as "tightrope" and "entanglement."[12] Another commentator remarks, "Certainly there is something anomalous about a wall that will admit a school bus without the 'slightest breach,' but is impermeable to a prayer."[13]

Problems with the concept of a "wall" arose soon after the Everson case in Illinois ex rel. McCollum v. Board of Education, a case dealing not with state aid to nonpublic schools but with the teaching of religious subjects in public schools. Again, Justice Black's opinion for the Court declared the existence of "a wall between Church and State which must be kept high and impregnable" and ruled against a "released time" program whereby children received religious instruction on a voluntary basis on public school premises.[14] Justice Jackson, in a concurring opinion, agreed with the verdict but questioned whether the notion of a "wall" served any useful purpose:

> I think it remains to be demonstrated whether it is possible, even if desirable, . . . completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction . . . . The fact is, that for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences . . . . Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view . . . . And I suppose it is a proper if not an indispensible, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is, that for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences . . . derived from paganism, Judaism, Christianity--both Catholic and Protestant--

> and other faiths accepted by a large part of the world's peoples . . . .
>
> It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. If with no surer legal guidance we are to take up and decide every variation of this controversy . . . . we are likely to have much business of this sort. And, more importantly, we are likely to make the legal "wall of separation between church and state" as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.[15]

A subsequent decision which severely limited McCollum and further weakened the "wall" was Zorach v. Clauson. Implicit in the Everson and McCollum majority opinions had been the notion of religious liberty as a byproduct of church-state separation. In Zorach, however, the Court upheld a public school "dismissed time" program which facilitated attendance at religion classes held off the school premises, and thus gave support to the position of religious liberty as an independent right, guaranteed by the free exercise clause, which could be protected by the cooperation and concert of public schools and religious institutions.[16]

The next U.S. Supreme Court case to deal directly with state aid to parochial schools came in 1968, twenty-one years after Everson. In Board of Education v. Allen,[17] the Court reviewed the constitutionality of a New York state law which required local school districts to lend textbooks to students, including parochial students. Justice White, in delivering the majority opinion, ruled that the statute, which had the stated purpose of furthering the educational opportunities available to the young, was constitutionally acceptable under the First Amendment. In drawing this conclusion, Justice White invoked in place of the "wall" metaphor a test first employed in Abington School District v. Schempp, a case dealing with school prayer:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the

> Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[18]

The case which put the finishing touches on the weakening concept of the "wall" was the Court's 1970 decision in Walz v. Tax Commission. Clearly if the no-aid dictum of Everson were to be upheld ("no tax . . . can be levied to support any religious activities or institutions"), then all forms of tax support for religious institutions, including tax exemptions, were called into question. This was the point at issue in Walz: specifically whether church exemptions from state real property taxes were constitutional. Chief Justice Burger, in holding for the Court that such exemptions were allowable under the First Amendment, noted the difficulty of wending a neutral course between the two religion clauses. Both, he observed, are cast in absolute terms, and either, if followed to its logical extreme, would clash with the other:

> No perfect or absolute separation [of church and state] is really possible; the very existence of the Religion Clauses is an involvement of sorts--one which seeks to mark boundaries to avoid excessive entanglement.
>
> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference . . . .[19]

Burger sought support in Everson and Allen for this emphasis on "benevolent neutrality:"

> Surely bus transportation and police protection to pupils who receive religious instruction "aid" that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age . . . . Similarly making textbooks available to pupils in parochial schools in common with public schools was surely an "aid" to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books.[20]

The Court proposed a new test for the constitutionality of a given act which differed somewhat from that used in Allen:

> Each value judgment under the Religion Clauses must . . . turn on whether the particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so [emphasis added].[21]

The significant difference here is that the word "establish" rather than "advance" (as in Allen) is used, thus narrowing the class of acts clearly prohibited. This allows more room for the "play in the joints" suggested earlier by the Chief Justice, and it makes the issue a question of degree:

> [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.[22]

The cumulative effect of Zorach (released time), Walz (tax exemption) and Allen (provisions of textbooks) was to displace the doctrinal approach of Everson with more pragmatic tests as a guide on educational aid issues. This meant that judicial decisions had to take into account the particular purposes and effects of a legislative program and to evaluate whether its primary effect was to benefit the child or to establish religion. The result was a broadening of the "child benefit" theory already articulated in Everson, under which a law which had the primary effect of benefiting the secular education of the child and only incidentally aided a religious institution was not considered unconstitutional. In Allen, the test became the more general one of whether a law had "a secular legislative purpose and a primary effect which neither advances nor inhibits religion;"[23] in Walz the test became whether a law "establishes" religion or to what degree it "entangles" the state with religion.[24]

The emphasis upon "entanglement" was renewed in two recent cases on the state-aid issue. Lemon v. Kurtzman[25] and Tilton v. Richardson[26] have delved further into the intracacies of entanglement and, in doing so, have shed a little more light in some areas and a little more darkness in others. The Court in Lemon overturned recently passed laws in Rhode Island and Pennsylvania which directed the states to reimburse parochial schools for "secular services" in the form of teachers salaries and (in Pennsylvania) for textbooks and instructional materials. Chief Justice Burger, in delivering the majority opinion, admitted:

> Candor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.
>
> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization.[27]

In ruling that the state laws created excessive entanglement, the Court invoked the "three main evils" against which the Establishment Clause was to provide protection, as they were demarcated in Walz: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[28] At the same time, Burger pronounced the demise of the "wall" and expanded the notion of empirical considerations:

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sens . . . . Judicial caveates against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship . . . .
>
> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.[29]

In this case, the Court simply determined that the degree of entanglement was excessive, due primarily to the factors of teaching and administrative requirements.

In another ruling handed down at the same time, the Court found the balance tipped in the opposite direction. The Court upheld in Tilton v. Richardson a series of federal building grants to church-related colleges. This sort of aid, Burger's opinion stated, did not violate the religion clauses because, in contrast to the sort of aid envisioned in Lemon, building grants (1) go to church-related colleges where "religious indoctrination is not a substantial purpose or activity," (2) have a "nonideological" character, and (3) require only a "one-time, single-purpose" administrative act rather than continuing surveillance.[30]

> No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in Lemon and Dicenso [companion case to Lemon]. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.[31]

As to the possibility of inequitable taxation, as charged by the appellants, the Court argued the public "share of the cost of the grants under the Act is not fundamentally distinguishable from the impact of the tax exemption sustained in Walz or the provision of textbooks upheld in Allen."[32]

The over-all doctrine of the Court as it now stands appears to be that state aid to religiously affiliated institutions is permissible if (1) the primary benefit is a secular one, (2) the aid does not involve the state in excessive entanglement with religion, and (3) the effect of the aid is neutral with respect to religion. Burger's opinion in Tilton sketches this policy:

> Our cases from Everson to Allen have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend.[33]

The principle of "neutrality" as articulated in the recent cases brings up once again the wider issues suggested earlier with respect to the state and education. To require the state to be neutral with respect to religion is to prohibit state partiality to one religious group over another or to religious groups over non-religious groups or vice versa. But in the modern state which presides over massive institutions and exercises enormous economic control, decisions about the allocation of funds have the effect of directing people into one activity or another; in the case of schools, this means that decisions on state support effectively keep open or close schools, both public and nonpublic. For the state to observe strict neutrality, then, might require it to insure that education of all forms received approximately equal support from the state.

Complete neutrality in this sense, however, is fraught with a number of difficulties. In addition to problems of entanglement, there is difficulty in deciding what sorts of nonreligious groups might be eligible for equal support. In Walz, Justice Harlan suggested in a concurring opinion that groups eligible for equal treatment would be a set of educational, cultural and religious institutions so broadly defined as to include "groups whose avowed tenets may be antitheological, atheistic, or agnostic."[34] Harlan observed that neutrality "in its application requires an equal protection mode of analysis."[35] Justice Douglas in his dissenting opinion in the same case argued that strict neutrality requires that such groups be included.[36]

The general problem of state aid to nonpublic schools, then, is not simply one of religious freedom: It also is a question of equal educational opportunity and freedom of conscience in general. One commentator warns that preoccupation with the religious aspects of the issue may undermine attempts to improve the quality of the educational system as a whole. She emphasizes that "there are important educational, as well as religious, issues at stake."[37]

Areen,[38] Valente[39] and others suggest that the most feasible test for the neutrality of aid is on the basis of "voluntarism"--the principle of "protection of individual choice in matters of belief from governmental pressure:"

> A genuinely neutral funding plan will enhance voluntarism, not distort it. Moreover, by focusing on which families are going to benefit from an aid program, it is often easier to determine the likely educational as well as religious effects. Programs which aid the religious choices of only the white middle class for example, are likely to continue if not increase the present racial and economic segregation in public education, which is a major cause of the present shortcomings of that system.[40]

The problems associated with maximizing voluntarism and minimizing entanglement are being dealt with now in the administration of the statutes of some states and of the federal aid programs to elementary, secondary and higher education. Whatever the particular means decided upon, however, it is clear that the U.S. Supreme Court has abolished the notion of a "wall" and has replaced it with pragmatic tests for the constitutionality of individual aid programs to nonpublic schools. Because of the conflicting principles involved, the Court has rejected doctrinaire approaches and continues to wend a difficult path between educational rights and sectarian entanglements.

STATE PROVISIONS

The situation in the states with respect to state aid to nonpublic schools is quite different from that at the federal level. There is a great deal of variation among state constitutional and statutory provisions on the subject. While some states have no constitutional provisions governing the use of state funds for nonpublic schools and thereby implicitly adopt the federal standards, others have provisions of varying degrees of strength, some of which far exceed the federal criteria in prohibiting state aid to nonpublic education. Some states, for instance, forbid indirect aid such as busing and textbooks, which are permissible under the U.S. Supreme Court's interpretation of the First Amendment.

Classification of state constitutional provisions is difficult and may be done only in rough terms. The following general discussion of categories of state-aid provisions appeared in a 1970 study:[41]

> Thirteen states have very stringently worded restrictions, all created between 1870 and 1917. The earliest of these is found in the Illinois constitution of 1870 (Article VII) and repeated verbatim [sic] in four constitutions written later--Missouri (1875), Colorado (1876), Montana [not verbatim] (1889), and Idaho (1899):
>
> "Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatsoever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever, nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose."
>
> The period during which strictures of this severe type were created was characterized by rapid immigration, strong nativistic movement, and widespread disparagement of an attempt in New York, a few years earlier, to obtain public funds for Catholic schools on the ground that the public schools were blatantly Protestant--as indeed they were.[42] There is much evidence to suggest that the prohibitions against aid were prompted in important measure by fear of the Catholic church and its

foreign-language schools by Protestant citizens and lawmakers and by failure to recognize the religious bias in public schools against which Catholics were reacting. Not a single Catholic was represented at the Illinois convention when the above-quoted measure was adopted. Numerous attempts were made during the period to halt instruction in foreign languages in nonpublic schools at various grade levels and even to outlaw the nonpublic schools themselves.[43]

New York's "Blaine Amendment" is perhaps the best known of the rigorous interdictions against assistance to religiously affiliated schools:

> "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly, or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

Other states with overtly severe prohibitions of this type are Georgia (1877 Constitution), Massachusetts (1917 Constitution), Nebraska (1875 Constitution), Nevada (1880 Constitution), Oklahoma (1907 Constitution), South Carolina (1895 Constiution), South Dakota (1889 Constitution). Prohibitions that seem somewhat less severe in wording are found in the constitutions of Arizona (1910), California (1879), Hawaii (1950), and Utah (1895). Maryland (1867 Constitution) and Vermont (1793) have no explicit ban against aid to nonpublic schools. In verbal terms, relatively mild restrictions are found in the following constitutions:

Alabama-1875
Alaska-1956
Arkansas-1836, 1874
Connecticut-1818
Delaware-1897
Florida-1885, 1968
Indiana-1851
Iowa-1857
Kansas-1859, 1966
Kentucky-1891
Louisiana-1864,79,98,1913
Maine-1819
Michigan-1835,50,1908,1963

Minnesota-1877
Mississippi-1869
New Hampshire-1877
New Jersey-1875, 1947
New Mexico-1911
North Carolina-1868
North Dakota-1889
Ohio-1851
Oregon-1859
Pennsylvania-1874
Rhode Island-1843
Tennessee-1870
Texas-1876

Virginia-1902
Washington-1889
West Virginia-1872
Wisconsin-1848
Wyoming-1889

Examples of provisions of various stringency include:[44]

Overtly Severe Provisions

Nebraska [Art. VII, Sec. 11]--No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes, nor shall the state accept any grant, conveyance, or bequest of money, lands or other property to be used for sectarian purposes. Neither the State Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof. No religious test or qualification shall be required of teacher or student, for admission to or continuance in any public school or educational institution supported in whole or in part by public taxation.

South Dakota [Art. VI, Sec. 3]--No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.

South Dakota [Art. VIII, Sec. 16]--No appropriation or lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.

Less Severe Provisions

Hawaii [Art. IX, Sec.1]--The State shall provide for the establishment, support and control of a statewide

> system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no segregation in public educational institutions because of race, religion or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution.
>
> Utah [Art. X, Sec. 13]--Neither the Legislature nor any county, city, town, school district or other public corporation, shall make any appropriation to aid in the support of any school, seminary, academy, college, university or other institution, controlled in whole, or in part, by any church, sect or denomination whatever.

Mild Provisions

> Oregon [Art. I, Sec. 5]--No money to be appropriated for religion. No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.
>
> Wyoming [Art. I, Sec. 19]--Appropriations for sectarian or religious societies or institutions prohibited.--No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.
>
> Wyoming [Art. VII, Sec. 8]--[N]or shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.

State Court Interpretations

State court interpretation of the nonpublic school aid provisions in state constitutions has been summarized as follows:[45]

> It is impossible to determine from the phraseology of the relevant constitutional clauses, however, how balefully the state courts will view efforts to give

> funds (variously described) for any purpose other than support of the public schools. In an effort to circumvent a taboo of this kind, Connecticut's recent "purchase of secular services law" (Public Act No. 791) declares that "No portion of the 'school fund' shall be used to make any payment under this act." In its earlier but similar legislation, Pennsylvania was more cautious, avoiding usual appropriation mechanisms. It drew funds for assistance to nonpublic schools directly from horse racing revenues. In a tuition grant bill introduced into the Florida legislature in March, 1970 (unidentified by number on my copy), the following provision is found:
>
> "There is hereby established a non-public school tuition fund to be known as the 'tuition fund,' which will be used to defray part of the tuition charges for the secular education of children who are residents of the state and who attend non-public schools in the state in grades kindergarten through twelve. This fund shall be administered by the Department of Education. No monies appropriated to this fund shall be derived directly or indirectly from the state's school fund as defined in . . . the Florida Constitution."
>
> It is too early to predict whether most of the relevant state courts will regard these methods as a transparent subterfuge or will accept them as valid.
>
> In a basic sense, however, despite their often emphatic phraseology, the state constitutions raise the same central issue as does the First Amendment to the Federal Constitution: In what ways, if any, can aid to nonpublic schools be squared with the church-state separation that is essential to religious liberty and domestic tranquility? Constitutional lawyers differ as to the best approach to separation of church and state, and the courts have been far from consistent on the issue.

MONTANA PROVISIONS AND INTERPRETATIONS

The provision in the Montana Constitution, as previously noted, is among the most severe of state prohibitions against state aid to church-related schools:

> Neither the legislative assembly, nor any county, city, town, or school district, or other public

> corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever. [Art. XI, Sec. 8]

As suggested above, this provision appears to have been copied almost verbatim from the Illinois Constitution. However, there is an important difference: In addition to the Illinois language, the Montana provision includes the phrase "directly or indirectly." This is crucial to judicial interpretation, as will be seen below.

Other provisions in the Montana Constitution which have bearing on the issues of public and nonpublic education, religious freedom and church-state separation are the following:

> Art. III, Sec. 3. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed, and no person shall be denied any civil or political right or privilege on account of his opinions concerning religion, but the liberty of conscience hereby secured shall not be construed to . . . justify practices inconsistent with the good order, peace, or safety of the state, or opposed to the civil authority thereof, or of the United States. No person shall be required to attend any place of worship or support any ministry, religious sect, or denomination, against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.
>
> Art. V., Sec. 35. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.
>
> Art. XII, Sec. 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.
>
> Art. XIII, Sec. 1. Neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise,

> to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the state by operation or provision of law.

In addition to these constitutional provisions, two provisions of the Montana State Enabling Act, adopted as Ordinances by Congress and the Montana Constitutional Convention of 1889, have a bearing on the relationship between public and sectarian education in Montana:

> First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of the state of Montana shall ever be molested in person or property, on account of his or her mode of religious worship. [Ordinance No. 1]

> Fourth. That Provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said state of Montana and free from sectarian control. [Ordinance No. 1]

There is little to aid in analyzing judicial interpretations of these provisions by Montana courts. What appears to be the only case on state aid to nonpublic schools to be decided by the Montana Supreme Court is State ex rel. Chambers v. School No. 10 (1970).[50] In this case the court struck down a tax levy approved by the voters of the Anaconda School District for the specific purpose of supporting teachers to teach secular subjects in parochial schools.

The case is important as a classic confrontation between the "establishment" and "free exercise" principles. The school board argued that the "free exercise" clauses of the federal and Montana [Art. III, Sec. 3] bills of rights required that the state not discriminate on religious grounds against the implementation of voted tax levies for schools. The state, on the other hand, argued that the levy violated the "establishment" clause of the First Amendment to the U.S. Constitution and Article XI, Section 8 of the Montana Constitution. The court recognized the primary importance of these provisions by listing all the related provisions in the Montana Constitution, Enabling Act and Ordinances noted above, but then declared:[51]

> [I]t is apparent that the primary question raised in this appeal is whether the contemplated use of public funds would contravene the provisions of the First and

> Fourteenth Amendments to the Constitution of the United States and the provisions of Article XI, Sec. 8 of the Montana Constitution.[52]

The court then cited Walz[53] at length to support its interpretation that the U.S. Supreme Court opposed this sort of financial aid to parochial schools (although Walz can be used both ways, as noted above).

In the eyes of the court, however, Article XI, Section 8 of the Montana Constitution was the crux of the matter:

> Returning to Section 8 of Art. XI, it cannot be asserted that this section is ambiguous or indefinite and thereby open to interpretation since it clearly states in no uncertain terms that no school district can directly or indirectly appropriate or pay from public funds to aid the support of any school controlled in whole or in part by any church, sect or denomination. While it was argued to the contrary by the appellants, that such section could be interpreted to support their theory of this case, we cannot accept such argument.[54]

By holding that the school board's action was illegal under this provision and corresponding state statutes [Revised Codes of Montana, 75-4609 and 75-3801], the court escaped having to deal directly with the "free exercise" clause.

The U.S. Supreme Court approximately a year later reached a similar verdict on a similar state-aid plan for teachers' salaries in the Lemon case discussed above,[55] albeit for somewhat different reasons. The Supreme Court emphasized the problem of "excessive entanglement," rather than a general prohibition of state aid to nonpublic schools, but the issue of teacher support was very much the same as that involved in the Montana case. In this sense, the Chambers decision is not more restrictive than the rulings of the federal court.

However, other aspects of the Chambers opinion do indicate that the Montana Court interprets the state Constitution to be more restrictive than the federal Constitution in prohibiting state aid to nonpublic schools. Early in the opinion the court admonishes:

> We do not intend to discuss all the cases which have been urged upon us as authorities since it is the constitutional provisions of our state where not in conflict with the provisions of the Constitution of the United States that should and will govern our decision.[56]

Later, the court refers to an Attorney General's Opinion[57] which seems to establish more rigid requirements for Montana than are set down in the federal Constitution. That opinion ruled that transportation aid to parochial school children was permissible under the Montana Constitution only if the parochial child rode in a public school bus and his parents reimbursed the state for the cost. This is a much more limited view than the U.S. Supreme Court's decision in Everson[58] which held that the state could reimburse the parochial students' parents for transportation costs. The Attorney General's Opinion seems to imply that the Everson type of aid program would be unconstitutional in Montana. If that is a correct interpretation, then Montana's constitutional provision is, indeed, more restrictive than the federal Constitution. The Attorney General's Opinion states:

> It is my opinion public school moneys may not be expended to pay transportation to a student attending a private or parochial school . . . . no public school money is to be spent for private school pupils either directly or indirectly.[59]

The appearance of the phrase "directly or indirectly" in the decisive passages of both the Supreme Court and Attorney General's opinions suggests it may be crucial in distinguishing between the state and federal limitations. Whereas some state laws which admittedly provide a sort of indirect aid to parochial schools through provision of textbooks, transportation, and released-time programs have been held acceptable under the U.S. Constitution, such programs would seem unlikely to be permissible (as a form of indirect aid) under the Montana Constitution.

In its ruling in Chambers the Montana Supreme Court noted that arguments concerning the general purpose and wording of Article XI, Section 8 were better directed to other bodies:

> As a guide to our discussion we recall the words of this court in State ex rel. Mills v. Dixon et al, 66 Mont. 76, 213 P. 227:
>
> "This case, like others comprehending constitutional questions of great magnitude, develops much by way of argument which is properly addressed to the people at large, or to a constituional convention, or, within conceivable limits, to the legislative assembly."[60]

NONPUBLIC HIGHER EDUCATION

The relationship between the state and nonpublic higher education differs in general from that between the state and elementary and secondary education. Colleges serve a wider constituency, operate under different controls and have different systems of finance than do locally controlled elementary schools. Moreover, nonpublic four-year colleges constitute a much larger portion of the nation's higher educational system (approximately one-third)[61] than nonpublic elementary and secondary schools do of the corresponding school system (approximately one-eighth).[62]

Higher education in the United States had its origin in nonpublic institutions, beginning with the founding of Harvard University in 1636; in fact, there was no public university in America until the founding of the University of Georgia in 1785. In 1900 62 percent of college and university students were enrolled in nonpublic institutions. This figure remained fairly constant until the mid-1950s, then began a rather steep decline to the current figure of approximately 28 percent. (See Table 3).

A major reason for the relative decline in the share of college students enrolled in nonpublic institutions is the dramatic increase in costs of education since World War II. Private institutions have been forced to raise tuition levels steeply or face the prospect of closing their doors. The effect has been to lower enrollments. Several studies have shown economic pressure is greater on nonpublic than on public universities and that the differential will increase in the future.[63]

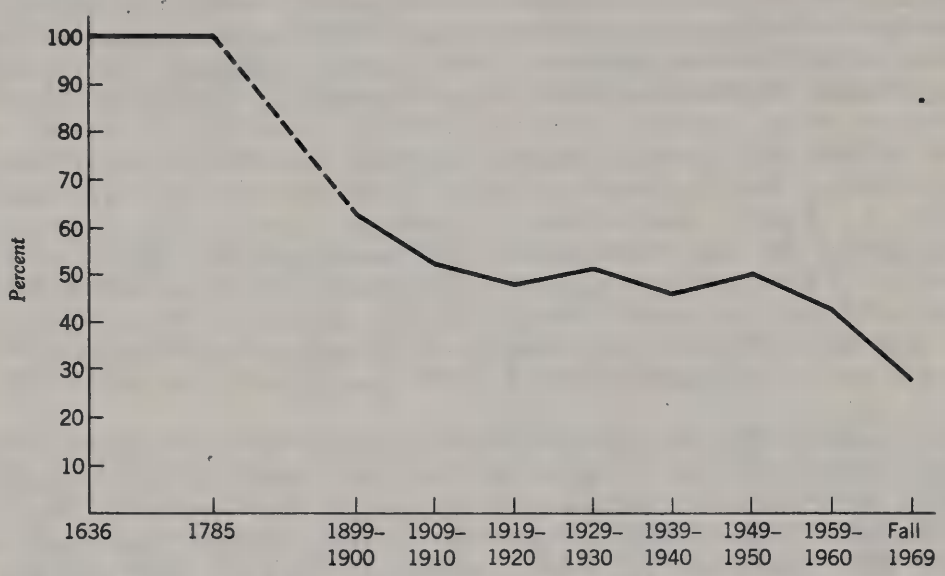
The federal government and the governments of some states have come to the assistance of nonpublic higher education through a system of categorical grants (i.e., grants for specific programs, for buildings or to students rather than flat grants to an institution).[64] Some states have provided such aid under existing constitutional provisions; some have amended their constitutions for this purpose. Maine, for example, added a constitutional amendment in 1967 [now Art. VIII, Sec. 2] providing for student loans for higher education, unrestricted to the type of institution the student attended.

The Carnegie Commission Report on Higher Education describes the present constitutional situation in the states:

> Some 900 of all [1400] private colleges and universities are church-related. In many states, direct aid to the remaining 500 private independent colleges would also raise constitutional questions. Fourteen states have constitutional provisions explicitly

TABLE 3

PERCENT OF UNIVERSITY AND COLLEGE STUDENTS ENROLLED IN PRIVATE INSTITUTIONS, 1636-1785 and 1899-1969
(Includes Enrollment at Two-Year Institutions)



SOURCE: Comparable data is not available for the period prior to 1899, but it is well documented that the first public institution in the present sense of the term was established in 1785. Source for the years 1899 to 1969 is the *Digest of Educational Statistics*, 1969, table 3, and *Opening Fall Enrollment*, U.S. Office of Education, Washington, D.C., 1969.

Source: The Carnegie Commission on Higher Education, The Capitol and the Campus (New York: McGraw-Hill Book Company, 1971), p. 15.

> prohibiting appropriations of money or property to privately controlled schools or institutions. Twenty-four states have constitutional provisions prohibiting the state and/or its political subdivisions from appropriating money or property to private individuals or organizations. Thirty-six states have constitutional provisions prohibiting the state and/or its political subdivisions from lending credit to or assuming the liabilities of private individuals or organizations. Twenty-eight states have constitutional provisions prohibiting the state and/or its political subdivisions from becoming joint owners or stockholders in private endeavors. On the other hand, eight states have constitutional provisions specifically authorizing public aid to private schools or for educational purposes under certain conditions.
>
> In the last decade several sectarian colleges have lessened their church connections through a variety of techniques. College management has been separated from the church. Lay members have been appointed to the governing boards. And nonsectarian members have been recruited for the faculty. While many of these moves were undoubtedly undertaken for other policy reasons, an additional impetus for some was the desire to become eligible for public aid.
>
> By making categorical grants, the federal government has provided aid to private institutions without incurring major constitutional obstacles. Both research and construction grants have been made to sectarian colleges on the assumption that the specific purposes of the grants were nonsectarian. There have been some attacks on the constitutionality of these categorical grants, but to date the grants have been upheld.
>
> The most common form of grant which has avoided constitutional barriers is a grant for the benefit of the individual rather than the institution. The student benefit approach has been used for years throughout the educational system without incurring serious constitutional attacks.[65]

The separate issues of educational opportunity and religious establishment and freedom, discussed earlier, are even more clearly differentiated in questions involving higher education. Since the vast majority of nonpublic elementary and secondary schools are clearly sectarian, most questions of state aid to them involve the First Amendment to the federal Constitution.

However, a large portion of nonpublic colleges and universities are clearly nonsectarian and many more have only a quasi-sectarian status. The Maryland Supreme Court, for example, ruled in Horace Mann v. the Board of Public Works (1966) that one church-related college was eligible for state grants because of its weak sectarian connections, while others were not. The United States Supreme Court provided a more definitive statement on this subject in Tilton:

> There are generally significant differences between the religious aspects of church-related insitutions of higher learning and parochial elementary and secondary schools. The "affirmative, if not dominant, policy" of the instruction in pre-college church-schools is "to assure future adherents to a particular faith by having control of their total education at an early age." Walz v. Tax Commission, p. 671. There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom.
>
> The record here would not support a conclusion that any of these four institutions departed from this general pattern. All four schools are governed by Catholic religious organizations, and the faculties and student bodies at each are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology

> courses at Albertus Magnus and Sacred Heart are taught by rabbis. Finally, as we have noted, these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed. In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.
>
> Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws [citations omitted].[66]

Clearly, then, some forms of state aid to church-related nonpublic institutions of higher education or to students enrolled in them is permissible under the federal Constitution. The question for the Montana Constitutional Convention becomes whether the present provisions in the Montana Constitution, which seem to prohibit such aid, should be retained or should be modified to allow it. The pros and cons of this issue are considered below.

STATISTICS

The following information indicates the scope of nonpublic education in the United States and in Montana.

Estimated enrollment in the United States in nonpublic schools for 1969-70 was 6.5 million students, or approximately 11 percent of the total enrollment of 51.8 million students.[67] Enrollment in nonpublic elementary and secondary schools in Montana for the same period was 11,645 students, or 6.3 percent of the total enrollment of 186,177.[68]

Enrollment in four-year nonpublic institutions of higher education in the United States in 1970 was estimated at 2.135 million, approximately 35 percent of the total of 6.1 million students in four-year colleges nationally.[69] Enrollment in the three nonpublic four-year colleges in Montana for the fall of 1970 was 2,775, or about 10 percent of the total Montana student population of 26,887 in 1970.[70]

POLICY ARGUMENTS

Because of the deep-set beliefs surrounding issues involving the state, nonpublic education and religion, rational arguments are unlikely to sway public positions. However, in the course of judicial and political controversies on this issue, substantial bodies of argument have been developed. The major points made for and against allowing state aid to nonpublic, parochial schools are as follows:[71]

Pro

1. In the absence of state aid, many nonpublic schools are likely to fail, placing a much greater economic burden on the state than would be the case under any form of aid program.

2. Nonpublic schools provide a vital form of educational and cultural diversity, which would be lost should such schools be forced to bow financially to a monolithic state school system. The framers of the national Constitution did not anticipate the growth of a vast twelve- or sixteen-year institutional system of state education, which, with the aid of the First Amendment, would submerge educational pluralism.

3. Parents with children in private schools have to pay tuition to private schools and taxes to support public schools, a double burden.

4. Public welfare benefits surely include secular education, and by the rulings in Cochran and Everson the benefits extended by the state to all citizens may not be denied to anyone because of his religious faith or lack of it. . . . . In the distribution of these benefits no Supreme Court opinion has held that the only constitutional formula is one which prevents even some incidental aid to religion.[72]

5. Parents should enjoy freedom of choice in education of their children; such freedom of choice should not become a burden because of the non-action of the state:

> In view of clear Supreme Court rulings precluding sectarian teaching and religious practices in public schools it can be persuasively argued that the granting of funds only to the public school is a violation of the establishment clause because such a policy endorses and prefers one educational and philosophical orthodoxy over all others.[73]
>
> 6. The fully accredited private school has important public dimensions in that it carries out the secular goals of the state; because of this semi-public status conferred on the private school this institution has some claim to share in the public funds set aside by the state for the education of all of its future citizens.[74]

7. More than half the states already have some kind of aid program which benefits students in parochial schools, providing services like free busing, textbooks, hot lunches and health care.

Con

1. It is impossible to separate the secular from the sectarian in parochial education; advancement of a particular religious philosophy and tenet is the fundamental purpose of parochial education.

> The education services of church schools are not rendered at the instance of the state, nor is a saving to the state the purpose or objective of such instruction. Religious instruction is calculated to strengthen religious faith and convictions, and the state may not constitutionally support such a project, even if incidental savings to the state can be shown.[75]
>
> 2. The principle of separation and freedom was conceived as a unitary principle. Notwithstanding occasional instances of apparent conflict, separation guarantees freedom, and freedom requires separation. The experiences in other countries indicate clearly that religious freedom is most secure where church and state are separated, and least secure where church and state are united . . . . The separation aspect was conceived to be as absolute as could be achieved, predicated as it was on the concept that religion is outside the jurisdiction of government.[76]

3. The public school system is still the backbone of the education system of the United States and should be the primary concern of the state. State aid to nonpublic schools would divert funds from public schools and might weaken or fragment the system.

> 4. If Quakers may constituionally be taxed to support armies and weapons which violate their religious beliefs, taxpayers whose religious sensibilities are offended by religious neutrality in public school instruction may be constitutionally taxed to support secular public schools.[77]

5. State aid could mean excessive state controls over private and parochial schools.

6. State aid might unfairly favor one religion over another or favor religious over secular nonpublic schools. State aid under some existing programs tends to assist established, well-to-do schools more than experimental, poor ones.

7. State aid to parochial schools could "polarize" politics where it is applied, threatening the integrity and quality of the public school system.

CONCLUSION

Although the present effect of Montana's constitutional provisions on the relationships among the state, nonpublic education and religion is not fully understood, the general interpretation is that they are much more restrictive than provisions in the federal Constitution. The Constitutional Convention therefore has four main alternatives:

1. Retain the present provisions or similar ones which prevent all state aid to denominational schools.

2. Modify Article XI, Section 8 (and possibly Article V, Section 35) to allow some forms of state aid, but not necessarily all that permissible under the federal Constitution. An example of this would be to delete the words "direct or indirect" from Article XI, Section 8.

3. Substitute a provision similar to the First Amendment to the U.S. Constitution which would be subject to the same sort of interpretation, thus permitting all aid which is allowed under the federal document.

4. Include no provision on the subject, which would have the same effect as alternative 3.

5. Modify solely Article V, Section 35, to allow for state aid to nonpublic but nonreligious alternative forms of education.

6. Include a provision, in addition to any or none of the above, that education be noncompulsory, allowing independence to the education of cultural minorities.

CHAPTER V

NOTES

1. Plato, Euthyphro, Apology, Crito, Phaedo, trans. F. J. Church, trans. rev. Robert D. Cumming (New York: The Liberal Arts Press, 1956).

2. Matt. 22:17-22; Mark 12:13-17; Luke 20 19-26.

3. Alexis de Tocqueville, Democracy in America, trans. Henry Reeve, Vol. 1 of 2 (New York: Schocken Books, 1961), pp. 298-392 ff.

4. Donald A. Erickson, "Introduction: Beech Grove Isn't Far From Andover," Public Controls for Nonpublic Schools, ed. Donald A. Erickson (Chicago: University of Chicago Press, 1969), p. 2.

5. Erickson, "Freedom's Two Educational Imperatives: A Proposal," Ibid., pp. 159-175.

6. Philip B. Kurland, Religion and the Law (Chicago: University of Chicago Press, 1962), p. 111.

7. Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

8. Ibid., pp. 16, 18.

9. Ibid., pp. 17-18.

10. Ibid., p. 19.

11. Robert M. Hutchins, "The Future of the Wall," The Wall Between Church and State, ed. Dallin H. Oaks (Chicago: University of Chicago Press, 1963), p. 17. Hereafter cited as Oaks, Wall.

12. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Walz v. Tax Commission, 397 U.S. 664, 672, 675 (1970); Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed. 2d 745, 753, 760-63 (1971).

13. Oaks, Wall, pp. 2-3.

14. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

15. Ibid., p. 235-38.

16. Zorach v. Clauson, 343 U.S. 306 (1952).

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17. *Board of Education v. Allen*, 392 U.S. 236 (1968).

18. *Ibid.*, p. 243, quoting *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

19. *Walz v. Tax Commission*, pp. 668-70 (1970).

20. *Ibid.*, pp. 671-2.

21. *Ibid.*, p. 669.

22. *Ibid.*, p. 675.

23. *Board of Education v. Allen*, p. 243. This case also expanded the concept that educational support which directly aids the child and only indirectly aids a religious institution was acceptable. The Court has never fully addressed itself to this specific point of the difference between "direct" and "indirect" aid, however. See William D. Valente, "Aid to Church Related Education--New Directions Without Dogma," *Virginia Law Review* 55 (1969): 590.

24. *Walz v. Tax Commission*, p. 669.

25. *Lemon et al. v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745 (1971).

26. *Tilton et al. v. Richardson*, 403 U.S. 672, 29 L.Ed. 2d 790 (1971).

27. *Lemon et al. v. Kurtzman*, L.Ed., p. 755.

28. *Ibid.*, citing *Walz v. Tax Commission*, p. 668.

29. *Ibid.*, pp. 756-757.

30. *Tilton et al. v. Richardson*, pp. 803-804.

31. *Ibid.*, pp. 804-805.

32. *Ibid.*

33. *Ibid.*, p. 804.

34. *Walz v. Tax Commission*, p. 697.

35. *Ibid.*, p. 696.

36. *Ibid.*, 708.

37. Judith C. Areen, "Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?" Case Western Reserve Law Review 22 (1971): 231. Cited hereafter as Areen, "Public Aid."

38. Ibid.

39. William D. Valente, "Aid to Church Related Education--New Directions Without Dogma," Virginia Law Review 55 (1969): 605-615.

40. Areen, "Public Aid," p. 247. A study by the U.S. Commission on Civil Rights observes that "private and parochial school enrollment, which is overwhelmingly white . . . is a significant factor in the increasing separation of white and Negro school children." [U.S., Commission on Civil Rights, Racial Isolation in the Public Schools (Washington: U.S. Government Printing Office, 1967), p. 31]. The study noted that almost 40 percent of the white elementary school students in fifteen large metropolitan areas attended nonpublic schools in 1960.

41. From Donald A. Erickson, "Central Constitutional Questions Concerning Aid to Nonpublic Schools," mimeo copy of an address presented at the Midwestern Conference of the Council of State Governments, Lake Delton, Wisconsin, June 30, 1970, pp. 1-2. Cited hereafter as Erickson, "Constitutional Questions."

42. See, for example, Leo Pfeffer, Church, State and Freedom, rev. ed. (Boston: Beacon Press, 1967), pp. 350-353. Cited hereafter as Pfeffer, Church.

43. Ibid., pp. 514-516.

44. These also appear in the Chapter XVIII in Montana, Constitutional Convention 1971-72, Constitutional Convention Commission, Taxation and Finance, Montana Constitutional Convention Report No. 15 (Helena, 1971).

45. From Erickson, "Constitutional Questions," pp. 2-4.

46. Judd v. Board of Education, 15 N.E.2d 576 (1938).

47. Roy B. Allen and Robert Marshall, "'Child Benefit' Has Lost Its Glitter," Phi Delta Kappan, November, 1962, pp. 77-79.

48. Durn v. Chicago Industrial School for Girls, 280 Ill. 613, 117 N.E. 735 (1917).

49. Trost v. Ketteler Manual Training School, 282 Ill. 504, 118 N.E. 352 (1918); St. Hedwig's School v. Cook County, 289 Ill. 432, 124 N.E. 629 (1919).

50. State ex rel. Chambers v. School District No. 10, 155 Mont. 422, 472 P.2d 1013 (1970).

51. The court did not specify why it did not discuss other provisions in the Constitution, but it appears that these were less clearly related to the case. For example, at issue was a locally voted tax levy which therefore would not come under the provision in Article V, Section 35, which relates to appropriations by the legislature. Also, various forms of "child benefit" aid would not appear to be affected by this provision. As to Article XII, Section 11, the court has interpreted "public purpose" in a very broad sense to be equivalent to "governmental purpose" (State ex rel. Mills v. Dixon et al., 66 Mont. 76, 83, 213 P. 227 [1923]) and has indicated it is for the legislature to decide, while the courts will "indulge every reasonable presumption in favor of the legislative decision in this respect." Lewis and Clark County v. Industrial Accident Board, 52 Mont. 6, 12, 155 P. 268 (1916).

52. State ex rel. Chambers v. School District No. 10, p. 431.

53. Walz v. Tax Commission.

54. State ex rel. Chambers v. School District No. 10, p. 437.

55. Lemon et al. v. Kurtzman.

56. State ex rel. Chambers v. School District No. 10, pp. 427-428.

57. 19 Opinions of the Attorney General No. 228 (1941), p. 358.

58. Everson v. Board of Education.

59. 19 Opinions of the Attorney General, p. 348 cited in State ex rel. Chambers v. School District No. 10, p. 439.

60. State ex rel. Chambers v. School District No. 10, p. 436.

61. The Carnegie Commission on Higher Education, The Capitol and the Campus: State Responsibility for Postsecondary Education (New York: McGraw-Hill, 1971), p. 15. Cited hereafter as Carnegie Commission Report.

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62. Robert F. Drinan, "The Constitutionality of Public Aid to Parochial Schools," The Wall Between Church and State, ed. Dallin H. Oaks (Chicago: Chicago University Press, 1963), p. 57. Cited hereafter as Drinan, "Constitutionality."

63. Carnegie Commission Report, pp. 70-71. The studies referred to are Select Committee for the Study of Financial Problems of Private Institutions of Higher Education in the Commonwealth of Massachusetts, Financial Problems of Massachusetts Private Higher Education (1970); Independent Colleges and Universities of Indiana, Strengthening Independent Higher Education in the State of Indiana (Indianapolis, 1970), and Earl F. Cheit, The New Depression in Higher Education (New York: McGraw-Hill, 1971).

64. Carnegie Commission Report, p. 91.

65. Ibid., pp. 93-94.

66. Tilton et al. v. Richardson, L.ed.,pp. 803-804.

67. U.S., Office of Education, Projections of Educational Statistics to 1976-77 (Washington: U.S. Government Printing Office, 1968), pp. 8-9. Cited hereafter as U.S.O.E., Projections.

68. Montana, Constitutional Convention 1971-72, Constitutional Convention Commission, Taxation and Finance, Montana Constitutional Convention Report No. 15 (Helena, 1971), pp. 350-353. Cited hereafter as Montana Con-Con Study, Taxation,

69. U.S.O.E., Projections, pp. 16, 17.

70. Montana Con-Con Study, Taxation, pp. 350-353.

71. The following arguments are directed primarily to parochial education since almost all nonpublic schools in Montana are church related. However, many of the arguments apply as well to nonsectarian private education and could be addressed to Article V, Section 35 of the Montana Constitution in addition to Article XI, Section 8.

72. Drinan, "Constitutionality," pp. 71, 72.

73. Ibid., p. 72.

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74. Ibid., p. 71.

75. Murray A. Gordon, "The Unconstitutionality of Public Aid to Parochial Schools," The Wall Between Church and State, ed. Dallin H. Oaks (Chicago: Chicago University Press, 1963), p. 87. Cited hereafter as Gordon, "Unconstitutionality."

76. Pfeffer, Church, p. 727.

77. Gordon, "Unconstitutionality," p. 88.

CHAPTER VI

DISTRIBUTION OF POWERS

WHO GOVERNS EDUCATION?

Although the central authority for public education lies with the state, in practice the powers and responsibilities are distributed throughout all levels of government. On the one hand, the strong tradition of local control still exercises a powerful influence on the educational system; on the other hand, the growing reliance on federal funds and leadership produces increasing influence from the national level. This fluidity of operation results both in harmonious cooperation and in the pulling and tugging of intergovernmental power struggles. Local, state and federal units of government all have a claim to a piece of the action in the educational field.[1]

Fundamental to this system of shared power is the issue of centralization versus decentralization. As part of the general question of the locus of power in government, the issue of where to place primary control of the schools is caught between two fundamental principles: universality and direct control. On the one hand, the need to provide general standards of quality as well as efficient operations impels central state and national agencies to assume increasing control over education. This is particularly true in an era of high population mobility and rapid technological change. On the other hand, the crucial democratic principle of direct popular control over social institutions takes on an even greater significance in mass society. Education is one of the few remaining areas where local control is still a reality, and it continues to provide a paramount example of the successful practice of decentralization in government. The conflict between these two principles and the resulting fusion between centralization and decentralization is the central issue in the constitutional establishment of powers on the local, state and national level.

POWERS OF THE STATE

In American government the state has a primary claim to authority in educational matters:

> No principle is more firmly established in American legal theory than the one which holds that each of the several states, within the sphere of its jurisdiction, is vested with plenary control over its

> educational policy. The courts agree that education is essentially and intrinsically a state function. The very existence of a democratic state demands that it be such. The power to maintain a system of public schools is an attribute of government in much the same sense as is the police power, the power to tax, to administer justice, or to maintain military forces. The concept of the supremacy of the state with respect to all educational matters over which it may exercise any control at all is a concept more than any other which governs our courts in resolving the practical issues involved in the maintenance and administration of our public schools; it is a concept that dominates legal thinking at almost every point.[2]

Thus, both historically and in legal theory, the state has acquired a preeminent role in governing education.

The most obvious manifestation of the state's authority is in the structure of the public school system, which is organized in terms of districts as subdivisions of the state rather than as autonomous local units. Although school districts in many cases may be coterminous with municipalities, the two units of government perform entirely different functions, the former as an instrument of state policy and the latter as a separate corporation for the purpose of local government. The courts have long held that municipal officials have only such powers with respect to education as are specifically delegated to them by the state. Thus, in several cases the courts have ruled, for example, that a city may not be involved in school financing beyond what is explicitly allowed by the state legislature,[3] that school board members are state officers and not officers of the municipality and that school districts are part of the state school system and not an institution of the municipality.[4]

This distinction between state and local authority is crucial in the case, for instance, of altering the structure of districts. Approximately one quarter of the state constitutions provide for the creation of school districts by the state legislature.[5] One source states that "few would doubt that the state legislature has the ultimate power to dissolve or create school districts as part of its authority to enact any legislation not prohibited by federal or state constitutions."[6] When challenged in the courts, this principle has been consistently upheld. Thus, in 1890 the Indiana Supreme Court held that school boards derive all their authority from state statues and therefore can exercise only those powers expressly granted or necessarily resulting from those expressly granted.[7] In 1963 the Pennsylvania legislature passed the Pennsylvania School District Reorganization Act, which gave the state education agency power to establish standards for administrative units, thus essentially delegating to it the power of redistricting. In the face of a challenge to this act, the Pennsylvania court upheld both the legislature's general authority to redistrict and its ability to "confer authority and discretion in connection with the execution of the law" upon a state agency. The court reasoned that the "true purpose and effect" of the constitutional provision was to empower the legislature to provide a thorough and efficient system of public schools and that this law was directed to that end:

> We have repeatedly held that a School District is a creature or agency of the Legislature and has only the powers that are granted by statute . . . . That the Legislature reserves its powers to alter the school districts . . . . . Surely, these school districts may not act in such a way as to forever bind the Commonwealth to a form of existence upon which they agree at one point of time . . . . The continued ability to alter the organization of the school system throughout the Commonwealth is a prerequisite to the fulfillment of the Legislature's constitutional duty to provide for the maintenance of a thorough and efficient system of public schools.[8]

Consistent with these judicial decisions is the strong twentieth-century movement by state legislatures to reduce the number of school districts. Between 1931 and 1967, the number of districts fell from 127,531 to 20,388.[9] The reason for this vast reduction is obvious: greater economies and better education programs generally can be offered in districts of larger size. Several states have made exceptionally large reductions in the number of districts, such as Idaho (1,500 to 117), Illinois (11,955 to 1,309), and Wisconsin (6,385 to 487). West Virginia has abolished all districts and installed in their place counties as the unit of school government.[10]

In Montana the legislature has chosen to delegate authority for organization and reorganization to the local units themselves, making redistricting a purely voluntary matter. Changes may be made in various ways. An elementary district may be created by decision of the county superintendent, subject to appeal to the county commissioners and it may be consolidated with or annexed to another district by means of a popular election [Revised Codes of Montana, 1947, Sections

75-6506, 75-6507 and 75-6518]. A high school district may be subject to approval by the superintendent of public instruction and may be consolidated by the county commissioners, but may be unified with an elementary school district only through an election [Revised Codes of Montana, 1947, Sections 75-6521, 75-6522, 75-6523, 75-6527 and 75-6528].

The Montana Supreme Court has ruled that a school district is a body corporate but does not possess the powers of local legislation and control that are the distinguishing characteristics of a municipal corporation.[11] It also has ruled that, although a school district is a public corporation, it may exercise only such authority as is expressly or necessarily conferred by law.[12] In Read v. Stephens the court held that, aside from statutory restrictions, the legislature has delegated to the county superintendent of schools and to the board of county commissioners a full measure of discretionary power in creating and changing school district boundaries. Where the administrative official exercises this statutory power neither arbitrarily nor fraudulently but within his sound discretion, the courts may not interfere.[13] Likewise, a new elementary school district can be created only by a county superintendent of schools in compliance with statute, and not by the judgment of a district court.[14] However, the court also has ruled that the legislature has not granted the county superintendent or board of county commissioners arbitrary power to change boundaries in disregard of statutory requirements.[15] School district reorganization has made substantial progress in Montana in the past twenty-five years. In 1947, Montana had 1,499 school districts. By May of 1970, this number had been reduced to 701. The saving in such consolidations is estimated by the Office of Superintendent of Public Instruction to be in some cases as much as six times the amount previously spent on schools.[16] Still, the process is often difficult and expensive, as carried out under the present statutes. Specific constitutional provisions on the organization of school districts could facilitate district reorganization. On the other hand, the state retains in any event the ultimate authority to organize districts and could proceed--if the legislature so desired--to carry out statewide district reorganization under present constitutional provisions.

Other State Powers

Constitutions in forty-six states specifically provide for establishment of a system of public schools. The four which do not are Iowa, Massachusetts, New Hampshire and South Carolina.[17] Eight state constitutions both establish a public school system and define what this means (Arizona, California, Connecticut, Kansas, North Dakota, Utah, Washington and Wyoming).[18] The definitions range in specificity from that of Utah (kindergarten, primary, grammar, high school, agricultural college, a university and other educational institutions as the legislature may provide) to Connecticut (free elementary and secondary schools).

The Montana Constitution provides for a public school system but does not further define the term:

> It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools [Art. XI, Sec.1].

The major arguments for including a definition of public school system in a constitution are that it offers a minimum guarantee that the state will continue to provide a thorough school system and that it spells out the state's responsibilities in specific areas, such as in higher or vocational education. The primary arguments against such a definition are that the minimal definition might be interpreted as maximal and that the nature and needs of education are changing so rapidly that such definitions become outdated very quickly.

James B. Conant in his definitive work, The Comprehensive High School, supports the latter viewpoint in his prediction that attendence at two-year colleges will increase to the point the "public education" will include grades thirteen and fourteen as well as one through twelve.[19] That is in accord with the present European system in which secondary education generally includes education up to the level of our freshman or sophomore college years (although for a smaller percentage of students than in our comprehensive high schools). This is just one of a vast number of possible changes in the basic structure and character of the educational system which might prove difficult to reconcile with specific constitutional definitions.

A variety of other state powers enumerated in constitutions, including provisions for higher education, equal educational opportunity, administration through boards of education and chief state school officers, and financial support of education, are discussed in the appropriate chapters in this study. More specific provisions, such as those concerned with textbooks, curricula and teachers, are included in some constitutions, but most states regard these as either statutory or local matters:

> Such specific requirements in state constitutions often prove to be unfortunate, especially in states having cumbersome procedures for their amendment. States without specific constitutional limitations permit local boards of education to adopt rules and regulations that hasten the advance of knowledge and the selection of textbooks. The Constitution of Iowa illustrates the grant of broad authority to local boards of education to make the necessary rules and regulations with the force and effect of law without defranchising the plenary power of the Legislature. Under Article 9, Section 8, the local board of education has full authority to make all needful rules and regulations, of course always subject to the power of the Legislature to decide differently.[20]

The state's power over education is limited by the constitutional reservation of certain powers to localities. Approximately half the states, including Montana,[21] constitutionally prohibit their legislatures from enacting special laws on the management of school districts.[22] An additional quarter of the states do the same thing statutorily. On the other hand, Massachusetts, for instance, specifically grants the state legislature the power to dissolve or establish school districts. Thus, education finds itself caught exactly in the legal and administrative gulf between local autonomy and state sovereignty.

POWERS OF LOCALITIES

Although the ultimate, formal authority for education lies clearly with the state, both traditional practices and other legal principles place a large amount of control in the hands of local bodies. As indicated in Chapter I, the educational system in America has evolved from the local level upward, rather than from the state downward. Therefore, the tradition of local autonomy is very strong, and legal and governmental practices across the country tend to reinforce this structure. Only comparatively recently, for a variety of financial and administrative reasons, have state and national governments begun to extract significant measures of control from the local units.

Newton Edwards, an expert on legal matters related to education, describes the de facto independence of local education boards as follows:

> In any analysis of the anatomy of authority with respect to the American educational system it is easy to overstress the actual powers of both the federal and state governments. As a matter of fact, the conviction that education is essentially a community affair lies deep in the American tradition. The American people have long insisted, regardless of the theoretical locus of naked authority, that the local school corporation be regarded as the responsible operating agency and that it be vested with whatever power this responsibility entails. The result has been that during most of our history the federal government, regardless of the power it might have exercised, has not in fact exercised any extensive control over local policy decisions. And the several state governments, instead of exercising directly the vast powers vested in them, have chosen to delegate to the local school districts such powers as were necessary to make them responsible operating agencies. And the American state courts have guarded jealously the powers which state legislatures have conferred upon local school boards. They insist, to be sure, that a local school board have authority to act, but once that authority has been bestowed they will not control the school board's discretion in the exercise of it unless that discretion has been unreasonably and arbitrarily abused. The courts have refused to exercise their power of judicial review of administrative discretion in such a way as to make themselves super school boards. In actual practice, then, the states' policy of delegating powers to local school boards and the courts' practice of permitting school boards any reasonable exercise of discretion, acting together, have made the local school board the vital center of American education.[23]

As mentioned earlier in this chapter, about half the states constitutionally anchor this traditional local autonomy in provisions which prohibit their legislatures from enacting specific laws on the management of school districts. Accordingly, a clear distinction has been made by the courts between legislative and administrative authority over schools. The former is reserved to the state legislature and the latter to the discretionary power of the local boards. Once the authority has been delegated and adequate standards have been provided to control the exercise of discretion, the courts have ruled that the local boards must be left alone to exercise this power.[24] Likewise, a state legislature may not act arbitrarily or without any reasonable basis for so doing.[25]

Hawaii is the only state with a completely centralized school system (i.e., where all administrative, policy-making and fiscal decisions are made in the state department of education). All other states vest varying degrees of autonomy in the local units. This may include any or all of the following: (1) Governmental autonomy, including establishing and changing district boundaries, election of officials, number and qualifications of board members, etc.; (2) fiscal autonomy, including complete independence in the power to determine budgets and to levy taxes or cause them to be levied;[26] (3) property ownership and management autonomy, including bonding authority, title to real estate and authority over building maintenance, location of schools and features of school building plans; (4) educational autonomy, including school curricula, teacher qualification requirements above those of the state, selection of teachers, teachers' salaries and provision of textbooks.

The autonomy possessed by the local boards provides in most cases independence both from interference by the legislature and from control by municipal governments. Where such powers have come into dispute, however, the vast majority of courts have distinguished between municipal interference, which has been overwhelmingly rejected, and state interference, which has been upheld in matters properly legislative and rejected in matters of administrative discretion.[27]

The combination of constitutional, statutory and judicial determinations have created for the local school district and its board a status of what might best be termed a "quasi-corporation." For example, an Illinois court held:

> Trustees of schools are a corporation, or more strictly a quasi-corporation, for the purpose and with the sole and only power of acting on matters pertaining to the public schools . . . and all other business is foreign to the object for which they were created a body corporate.[28]

A California court provided a slightly different definition: "A city school district . . . is a distinct corporate entity of quasi-municipal character, which is not lost or merged in that of the city."[29] A Pennsylvania court employed still another term for the school district and board: "municipal quasi-corporation."[30] The Kansas Supreme Court supplied a somewhat more lucid distinction between quasi-corporations and municipalities:

> The school district is, it is true, a public corporation, but the mere fact that it is a public corporation does not make it a municipal corporation, or, in other words, a municipality . . . . A municipality, properly speaking,

> is a corporation that has the right to administer local government, as a city or incorporated town. But a school district is only an agency of the State with limited corporate powers belonging to a class of corporate bodies known as quasi corporations. These are not municipalities within the meaning of the constitutional provisions referred to.[31]

The repeated use of the modifying term "quasi" reflects the rather uncertain status of the school district and board, but in general it may be interpreted to mean a local agency created to carry out state rather than local functions. In practice, this quasi-corporate status grants school districts a large measure of independence from municipal control, and, to the degree allowed by the state constitution and statutes, a substantial amount of independence from direct state control as well.

Thus, it is left to constitutional and legislative determination to specify what powers and limits on powers are to be assigned to the state and local school units. In the absence of constitutional specification (as in Indiana, for example), the presumption is that all powers in education are reserved to the state:

> Essentially and intrinsically, the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of state, and not of local jurisdiction. In such matters, the state is the unit and the legislature the source of powers. The authority over schools and school affairs is not necessarily a distributory one to be exercised by local instrumentalities; but, on the contrary, it is a central power residing in the legislature of the state. It is for the lawmaking power to determine if the authority shall be exercised by a state board of education, or distributed to county, township, or city organizations throughout the state . . . .[32]

On the other hand, several states, including California, Colorado, Florida, Kansas, Ohio, Texas and Utah, provide constitutionally for the existence and powers of local school districts. For example, Article IX, Section 4 of the Florida Constitution states:

> (a) Each county shall constitute a school district; provided, two or more contiguous counties, upon vote of the electors of each county pursuant to law, may be

> combined into one school district. In each school district there shall be a school board composed of five or more members chosen by vote of the electors, for appropriately staggered terms of four years, as provided by law.
>
> (b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

The central constitutional issue of local control, then, is whether to enumerate in the constitution specific limits on state powers and grants of particular powers to local districts. A strong commitment to local control would seem to dictate inclusion of such provisions, whereas a position more in favor of full state authority and control would imply their omission.

In Montana, the status of local control appears to lie somewhere between the extremes. Although there are no present constitutional guarantees either of the existence or of the powers of local school districts, the Montana Constitution does imply in Article XI, Section 6 a general constitutional commitment to the support of districts:

> It shall be the duty of the legislative assembly to provide by taxation, or otherwise, sufficient means, in connection with the amount received from the general school fund, to maintain a public, free common school in each organized district in the state, for at least three months in each year [emphasis added].

Mention is also made of "school districts" in connection with other educational provisions in sections 3, 8, and 10 of Article XI.

School districts also are referred to in Article XIII, Section 6, concerning the limitations on debts which can be contracted by various governmental units.

The school district in Montana is statutorily established and defined [Revised Codes of Montana, 1947, Section 75-6501]; the Montana Supreme Court has interpreted its status accordingly. In Box v. Duncan, the court stated: "Obviously, the only purpose of a school district is to designate a certain territory within which a public school or schools may be established and maintained."[33] The court also has held that the powers of the Montana school district are limited to those specifically granted by the legislature:

> A school district is a public corporation, but with very limited powers. It may, through its board, exercise only such authority as is conferred by law, either expressly or by necessary implication.[34]

A further clarification of the status of the school district was made by the Montana court in Hersey v. Neilson, in which a school district is clearly distinguished from a municipal corporation. The court cited John F. Dillon, a nineteenth century Iowa Supreme Court justice and noted authority on municipal corporations:

> We may therefore define a municipal corporation in its historical and strict sense to be the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate, specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper . . . . Thus an incorporated school district, or county, as well as a city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation.[35]

Thus a school district is held to be a body corporate, but not one which has the powers of local legislation and control characteristic of a municipal corporation.

A somewhat less clear distinction was made by the court in State ex rel. v. McGraw, in which it was held that, just as the county was a body politic and corporate, each school district within the county

> is no less a corporation with definite and limited powers and duties. It has all the necessary and proper authority for its own government, independent of the county; its executive head is its board of trustees, acting in the manner prescribed by law.[36]

Here the school district appears in a somewhat indeterminate status between a county, which is solely a political subdivision of the state, and the city, which is autonomous in certain of its functions.

The central issue at stake which distinguishes the school district is the power of the purse. In many states, the ability to incur debt and to tax makes the school district almost fully autonomous. In Montana, however, an early decision (1900) of the Supreme Court strictly limited local district powers in these matters. In Jay v. School Dist. No. 1, the court held that since the school-district officers were not given the power to levy taxes, they likewise could not use their bonding power as a taxing device:

> School districts are public corporations but their powers are very limited. They can exercise none except such as are conferred by the law creating them, whether expressly or by fair implication. Not having the power, under the statute, either with or without a vote of the electors, to levy taxes for current purposes, they may not extend the term of school beyond the time for which there are funds provided.[37]

However, the laws since have been changed to allow both bonding and permissive taxes initiated by the school district trustees and approved by the electorate. Thus, the Montana school system falls generally into the category of a system with strong local control (particularly with respect to questions of districting and financing), but the local control is statutorily, rather than constitutionally, guaranteed.

FEDERAL POWERS

For the greater part of American history, the federal government assumed relatively little responsibility in the field of education. However, with the advent of great population mobility and the mass educational needs of contemporary society, the federal government is taking an increasing role in the educational system. Likewise, as decisions have arisen in education which were of consequence to the basic rights of all Americans, the national government has been impelled to assume leadership in securing these rights.

The source of this increased federal activity in education is not a specific U.S. constitutional provision but rather various other powers granted the federal government to provide for the general welfare and to protect individual rights. Thus, the primary federal constitutional sections which have had a major influence on American education are Article I, Section 8 (the general welfare clause), the First Amendment (religious freedom and separation of church and state) and the Fourteenth Amendment (due process and equal protection of the law). The general questions concerning educational rights are discussed elsewhere in this study; the major topic of concern here is the increasing federal involvement in the support and administration of education.

Although the federal role in education has a long history (beginning with the land grants by the Ordinance of 1785 approved by the Continental Congress and continued in the Morrill Act of 1862), the great expansion of this involvement came during the past half century. The vocational education acts of 1917, 1936, 1946, 1956 and 1963, the GI Bill providing assistance to veterans, extension of the land-grant support of colleges in 1914, Lanham Act of 1941 for school construction, the federally impacted aid acts of 1950, vocational rehabilitation acts of 1943 and 1954, surplus property acts of 1919 and 1944, school lunch acts of 1944 and 1954, Fulbright Act of 1946, library assistance acts of 1956 and 1960, National Science Foundation Act of 1950, National Defense Education Act of 1958, special education acts of 1958 and 1961 and the Elementary and Secondary Education Act of 1965 are but a few of the more than 200 major acts passed by Congress which have had a strong influence on education in the United States.

In 1948, the federal government reported that it operated more than 200 separate educational programs funded at the level of approximately $3.7 billion a year. By 1968, the level of federal support had risen to more than $6.8 billion with a corresponding increase in number of programs and in the size of the federal department (the Office of Education) which administers most of them.[38]

As Tables 1 and 2 show, in the period 1955-1968 alone the proportion of federal support of education in the United States grew from 5.9 percent to 13 percent. It is significant that the percentage of local support dropped by approximately the same amount as the federal share gained, while the state's share remained nearly constant. This gives further credence to the contention that the educational system is undergoing increased centralization.

The substantial federal involvement in creating and supporting educational programs has inevitably transferred part of the responsibility for education to the federal level. While constitutional authority on both state and federal levels is somewhat obscure on this point, the practical needs for financing, expertise and other forms of assistance have established the trend toward increasing federal involvement in education.

TABLE 1

ESTIMATED EXPENDITURES IN BILLIONS OF DOLLARS BY REGULAR AND OTHER EDUCATIONAL INSTITUTIONS BY SOURCE OF FUNDS

Source of funds, by control and level (1)	1955–56 (2)	1957–58 (3)	1959–60 (4)	1961–62 (5)	1963–64 (6)	1964–65 (7)	1965–66 (8)	1966–67 (9)	1967–68 (10)
					AMOUNT				
All levels:									
Total, public and nonpublic	$16.8	$21.1	$24.7	$29.6	$36.0	$39.9	$44.8	$48.8	$52.2
Federal	1.0	1.4	1.8	2.4	3.2	3.7	5.4	6.1	6.8
State	4.8	6.2	7.3	8.9	10.7	11.8	13.2	14.7	15.5
Local	7.2	8.5	9.6	11.2	12.9	14.1	14.9	15.8	16.6
All other	3.8	5.0	6.0	7.1	9.2	10.3	11.3	12.2	13.3
Total, public	13.6	17.0	19.7	23.4	28.0	31.0	35.0	38.2	40.6
Federal	.8	1.1	1.3	1.6	2.1	2.3	3.7	4.1	4.5
State	4.8	6.2	7.3	8.8	10.6	11.7	13.1	14.6	15.4
Local	7.2	8.5	9.6	11.2	12.9	14.1	14.9	15.8	16.6
All other	.8	1.2	1.5	1.8	2.4	2.9	3.3	3.7	4.1
Total, nonpublic	3.2	4.1	5.0	6.2	8.0	8.9	9.8	10.6	11.6
Federal	.2	.3	.5	.8	1.1	1.4	1.7	2.0	2.3
State				.1	.1	.1	.1	.1	.1
Local									
All other	3.0	3.8	4.5	5.3	6.8	7.4	8.0	8.5	9.2

Source: U.S., Office of Education, Projections of Educational Statistics to 1976-77 (Washington: U.S. Government Printing Office, 1967), p. 62.

TABLE 2

ESTIMATED EXPENDITURES IN PERCENTAGE BY REGULAR AND OTHER EDUCATIONAL INSTITUTIONS BY SOURCE OF FUNDS

Source of funds, by control and level (1)	1955-56 (2)	1957-58 (3)	1959-60 (4)	1961-62 (5)	1963-64 (6)	1964-65 (7)	1965-66 (8)	1966-67 (9)	1967-68 (10)
	PERCENT								
All levels:									
Total, public and nonpublic	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Federal	5.9	6.6	7.5	8.3	8.9	9.3	12.0	12.5	13.0
State	28.8	29.4	29.5	30.0	29.9	29.6	29.5	30.1	29.7
Local	42.9	40.2	39.0	37.3	35.7	35.3	33.3	32.4	31.8
All other	22.4	23.8	24.0	24.4	25.5	25.8	25.2	25.0	25.5
Total, public	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Federal	5.8	6.4	6.9	7.1	7.5	7.4	10.6	10.7	11.1
State	35.2	36.6	36.9	37.7	38.1	37.7	37.4	38.2	37.9
Local	52.5	50.0	48.8	47.3	45.9	45.5	42.6	41.4	40.9
All other	6.5	7.0	7.4	7.9	8.5	9.4	9.4	9.7	10.1
Total, nonpublic	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Federal	6.5	7.1	9.8	12.5	13.8	15.7	17.4	18.9	19.8
State				1.6	1.2	1.1	1.0	.9	.9
Local									
All other	93.5	92.9	90.2	85.9	85.0	83.2	81.6	80.2	79.3
Elementary and secondary schools:									
Total, public and nonpublic	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Federal	3.9	3.9	4.3	4.2	4.0	3.7	7.0	7.2	7.2
State	29.7	30.5	31.4	31.8	32.7	32.5	32.5	33.4	33.4
Local	56.2	53.5	52.4	51.9	50.8	51.5	48.5	47.8	47.8
All other	10.2	12.1	11.9	12.1	12.5	12.3	12.0	11.6	11.6
Total, public	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Federal	4.3	4.3	4.9	4.8	4.6	4.3	8.0	8.1	8.1
State	33.1	34.8	35.6	36.2	37.3	37.0	36.9	37.8	37.8
Local	62.6	60.9	59.5	59.0	58.1	58.7	55.1	54.1	54.1
All other									
Total, nonpublic	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Federal									
State									
Local									
All other	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: U.S. Office of Education, Projections of Educational Statistics to 1976-77 (Washington: U.S. Government Printing Office, 1967), p. 64.

Montana Situation

Because of its peculiar needs as a sparsely populated state and a variety of special federal interests, Montana has witnessed a greater than average growth in federal assistance to education. The proportion of federal assistance to education in Montana grew from 3.5 percent in 1950-51 to 8.4 percent in 1966-67.[39] Excluding the distribution of state school foundation program monies, federally funded programs accounted for 86 percent of the budget of the Office of the Superintendent of Public Instruction in the 1967-69 biennium, including the following:

Elementary and Secondary Education Act Titles I, II, III, V and VI-A, Educational Media, Surplus Property, School Food Services, Federal Impact Aid, Pupil Transportation, NDEA Title III, Agriculture Education, Fire Fighters Training, Guidance and Counseling, Health Occupations, Manpower Training, Vocational Education, Adult Basic Education, Indian Education, Education Professions Development, General Education Development Testing, Career Opportunities Program, Research, Evaluation and Veterans' Education and Training.[40] In other words, the vast majority of programs carried on by the state in education are either products of or heavily reliant upon federal support.

University education in Montana also is substantially assisted by federal funds and programs. On the average, about 7 to 10 percent of the operating revenues of the university system are derived from federal sources.[41] National projections of funding for higher education in the United States envision an even greater role for the federal government.[42]

The trend toward increasing federal participation in supporting and administering educational programs has little direct effect on state constitutions. However, the trend must be recognized as a powerful force shaping the structure of education and thus having a strong influence on the changing distribution of powers among the various levels of government. The federal relationship must be a significant consideration in the determination of the roles and powers of state and local boards of education, guarantees of educational equality, provisions relating to Indian education and provisions for financing education.

CENTRALIZATION VERSUS DECENTRALIZATION

The fundamental constitutional question emerging from consideration of the distribution of powers in education is the issue of centralization versus decentralization. There appears to be a distinct trend toward centralizing certain educational functions together with an increasing reliance on higher levels of government for financial support. The consequences of this trend are so far-reaching for the future of American education, and the decisions concerning them so basic, that they properly can be considered questions of a constitutional nature. The primary question is: Should control over and responsibility for education be vested in more centralized or in less centralized units of government?

It is not inevitable that this question be answered at the constitutional level; in fact, most state constitutions are not very specific on this point. Whether a given state's educational system is of a more centralized or more decentralized nature is the product of a combination of constitutional provisions, state statutes, local ordinances, judicial interpretations and local traditions. However, a constitution can indicate the desired direction of development of a state's educational system better than any other single vehicle. It provides a means for making explicit, conscious decisions about the fundamental character of the system.

Arguments For Centralized Educational System

Assuming that constitutional specification is desired on this point, there are several major arguments for centralization:

1. Efficiency. The savings which can be realized from economies of scale are as applicable to education as to other large endeavors. The provision of administration and facilities for education generally can be done better and more cheaply on a centralized basis. Financial and personnel requirements can be better met in a system in which policy decisions common to all schools can be made at one focal point and then applied uniformly. More qualified teachers, better equipment and more modern buildings per dollar can be obtained in large units with centralized purchasing procedures and integrated personnel management. This has been the fundamental reason for the major reduction in the number of school districts across the United States.

Robert Dentler, in describing the increased efficiency resulting from school consolidation in New York, states:

> The virtual elimination of the impoverished, isolated, understaffed and therefore disadvantaged little red schoolhouse, and the substitution of substantial, resourseful, consolidated rural schools in New York State testify to the fact that state policies, carried out across a broad front, can have enormously beneficial consequences for the education of youth.[43]

2. Financial Need. Apart from the question of efficiency, there is the simple problem of the insufficiency of funds raised at the local level. As shown above, the seemingly inevitable trend in educational financing is toward reliance on state and national sources of support:

> A generation or two ago, in the then 48 states with a decentralized system, the financing of the local schools was largely dependent on real estate taxes. In the last thirty or forty years, local school districts have become more and more dependent on the allocation of state funds. As the inadequacy of the local real estate tax for the support of adequate public schools has become more and more apparent, the importance of state educational officials and a state board has become increasingly clear. As a consequence, members of state legislatures have concerned themselves increasingly with appropriations of state funds for elementary and secondary public schools. This growing concern of state officials with public school financing naturally requires these same officials to direct their attention to such matters as teachers' salaries, pension rights, conditions of employment . . . .[44]

Some critics, such as Myron Lieberman, advocate a national system of federally supported schools.[45]

3. Equality. The need to provide an equitable education for all persons calls for the elimination of inequalities of educational resources among local districts.[46] In general this has meant the transfer of authority for school financing to increasingly higher levels of government in order to provide for uniform distribution of funds. The Book of the States notes that "most states have made attempts to provide a uniform, minimum level of educational opportunity by distributing funds on an equalizing basis to local school districts."[47] Harvey Mansfield notes the consequence of this trend:

> Seeking new money, whether to be furnished by direct state subsidy or by the relaxation of local taxing,

> borrowing or debt limits, or by larger federal grants, brings school problems into a broader political forum.[48]

4. Rapid Growth and Increased Complexity of Education. The pace of change and development in education has been increasingly rapid during the past several decades. Centralized systems generally are more able to keep up with educational innovation because of their greater resources and administrative capability. Mansfield argues the viewpoint of the professional on this issue:

> [T]he magnitude and technology of school operations in our age and public attention to the quality of their performance inevitably put their conduct and planning mainly in the hands of professionals. Lay officials cannot cope with their complexities . . . the day is past or passing when the school systems were a hunting ground for patronage, when school superintendents, board members or state legislators connived with textbook publishers on the adoption of texts and when nepotism prevailed in the appointment of teachers. Furthermore, professional organizations--particularly the teachers' associations federated in the National Education Association--have become major influences on legislative and administrative policy . . . .[49]

Arguments For Decentralized Educational System

It is precisely with some of the advantages claimed for centralization that proponents of decentralization take issue. For example, one observer, describing the emergence of "mini-schools" in New York and other areas, perceives a reversal in thought among some educators:

> Late in the 1960's pedagogical planners dreaming about "educational parks" for 10,000 students and a wonderland of technology to serve them discovered a funny thing. Behind them a grass roots movement was going in the opposite direction. The rise of the free school, the community school, the school-within-a-school--whatever the individual intent or style--was a reaction to the increasing anonymity and assembly-line treatment that had become the staple of public education, particularly in the cities.[50]

These are among several major arguments given by those who favor a decentralized school system:

1. Public Control. The danger of over-professionalization exists when education becomes solely the domain of the expert. Education is such an all-pervasive activity that democratic control is a necessary check on possible domination under the guise of expertise. Traditionally, education has meant the cultivation of civilized human society; this task cannot be handed over to any single group, no matter how technically qualified. Statements such as the one from Mansfield (see point 4, above) betray a lack of confidence in the ability of the layman to deal with his own education system, adjerents of decentralization claim.

Community control advocates see in locally controlled schools one aspect of the larger issue of local self-determination:

> A claim of political authority emanates from lengthy community consideration of the many public issues that can cause people distress until they realize that local problems are caused by bad laws, and can be solved only when the community is empowered to make its own laws.[51]

2. Local Involvement. The idea of public participation and interest in the education system is a prime tenet of the American democratic tradition. One study notes that:

> Education is considered to be a subject of primary interest to the citizenry, and therefore consideration of educational objectives and directions should be made most available to them. Such a system sustains the interest of the people in the education of their children and makes them more willing to provide the financial resources required to maintain an adequate school program. As a result, people's interest in education and their expectation of schools tend to rise.[52]

Such public involvement at the local level becomes increasingly valuable as more and more functions of local government are transferred to higher levels of organization. The ability to determine one's own fate in any important arena becomes an increasingly rare phenomenon in the mass society:

> Despite state and federal influence in local control, citizens for the most part appear to value the school district and the opportunity to participate in education decisions which have significance for the welfare of the people of their community. This is one of the few remaining opportunities for the citizen or taxpayer

> to affect directly the expenditure of public funds and thus control the tax rate.[53]

3. Flexibility. Despite having fewer resources, decentralized systems have an increased ability to provide a variety of school types and organization to meet local needs. Local control has encouraged experimentation and flexibility, which would be difficult in a more monolithic system:

> One of the great strengths of American education is diversity, a great variety of indigenous educational systems uniquely responsive to needs that vary in time and differ from place to place. This flexibility of educational policy derived from decentralized control also encourages creativity and experimentation, the handmaidens of educational progress.[54]

4. Financial Independence. Local control over the school budget means more responsibility and less competition with other state departments or with other municipal functions for funds.

5. Removal From Politics and Bureaucracy. Proponents of decentralization argue that education can be kept more nearly free of politics by making it a local rather than a state issue:

> Concern that schools be independent of political control has resulted in school districts that, in most communities except large cities, are virtually autonomous government units, existing separate and independent of municipal government. There are presently nearly 35,000 local boards of education. As long as much of the control of schools rests with them, it will be impossible for vested interests to gain control of any large sector of public instruction as a means of disseminating their particular doctrines.[55]

This holds true as well for bureaucratic control. Campbell maintains that although centralized bureaucracies are supposed to be neutrally efficient administrators of policy, there is little to indicate that they are better than local units in this respect:

> Centralization of control . . . must rest upon the assumption that central control is able to manage conflict and to impose or to utilize maximum intelligence in decision making . . . . At the moment there is little

> evidence that our political system produces more rational, or better decisions about education at the state or federal level than at the local level . . . . Decisions at all levels of government depend upon the capacities, the values, and the interests of the decision makers involved. Therefore, it serves little purpose to debate the quality of decisions at different levels.[56]

CHAPTER VI

NOTES

1. Cf. Education Commission of the States, Power Play for Control of Education: Educator vs. Politician, Government vs. Government (Denver, 1967); Truman M. Pierce, Federal, State, and Local Government in Education (Washington, D. C.: Center for Applied Research in Education, 1964); Alan Rosenthal, ed., Governing Education: A Reader on Politics, Power, and Public School Policy (New York: Doubleday, 1969); Nicholas Masters et al., State Politics and the Public Schools: An Exploratory Analysis (New York: Knopf, 1964).

2. Newton Edwards, "The Place of the Public School in Our Governmental Structure," Current Legal Concepts in Public Education, ed. Lee O. Garber (Philadelphia: University of Pennsylvania Press, 1966), p. 38. Cited hereafter as Edwards, "The Place of the Public School."

3. See Truman M. Pierce, Federal, State, and Local Government in Education (Washington, D.C.: Center for Applied Research in Education, 1964), pp. 85-88; Marion and McPherson Railway Company v. Alexander, 63 Kans. 72, 64 Pac. 978; City of Louisville v. Board of Education, 154 Ky. 316, 157 S.W. 379 (1913). In the latter case, the Kentucky Supreme Court stated: "When a municipal body, or a county, or a school district levies taxes for school purposes, the tax so levied is a state and not a municipal, county, or district tax, although it may be levied and collected by the municipal, or county, or district officer. The fact that the tax is levied and collected for the state by the agencies of the state appointed for that purpose does not deprive it of its character as a state tax."

4. Barnes v. District of Columbia, 91 U.S. 540 (1875).

5. George J. Collins, "Constitutional and Legal Basis for State Action," Education in the States: Nationwide Development Since 1900, ed. Jim B. Pearson and Edgar Fuller (Washington, D.C.: National Education Association, 1969), p. 10. Cited hereafter as Collins, "Constitutional and Legal."

6. Ibid., p. 11.

7. State ex rel. Clark v. Haworth, 122 Ind. 462, 23 N.E. 946 (1890).

8. Chartiers Valley Joint School District v. County Board of School Directors, 418 Pa. 520, 211 A.2d 487 (1965).

NOTES

9. Collins, "Constitutional and Legal," p. 11.

10. *Ibid.*, p. 12.

11. *Hersey v. Neilson*, 47 Mont. 132, 141, 131, P. 30 (1913).

12. *Finley v. School District No. 1*, 51 Mont. 411, 415, 153 P. 1010 (1915).

13. *Read v. Stephens*, 121 Mont. 508, 193 P.2d 626, 629 (1948).

14. *Weasel Head v. Armstrong*, 99 Mont. 364, 43 P.2d 243 (1935).

15. *Read v. Stephens*, p. 629; *Box v. Duncan*, 98 Mont. 216, 38 P.2d 986 (1934); *State ex rel. Lantz v. Morris*, 113 Mont. 187, 191, 126 P.2d 1101 (1942).

16. Dolores Colburg, "A Case for Changing School District Organization," *Montana Business Quarterly* 8 (1970): 9.

17. Hawaii, Legislative Reference Bureau, *Article IX: Education (Public Education)*, Constitutional Convention Studies (Honolulu: University of Hawaii, 1967), p. 6. Cited hereafter as Hawaii, *Public Education*.

18. *Ibid.*, p. 7.

19. James B. Conant, *The Comprehensive High School* (New York: McGraw-Hill, 1967), pp. 74-75.

20. Collins, "Constitutional and Legal," p. 10.

21. The Montana Constitution [Art. V, Sec. 26] provides: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say . . . providing for the management of common schools; . . . creating offices, or prescribing the powers or duties of officers in counties, cities, township or school districts; . . . ."

22. Collins "Constitutional and Legal," p. 10.

23. Edwards, "The Place of the Public School," pp. 40-41.

24. Cf. Hawaii, *Public Education*, p. 12, and Illinois case referred to therein: *Board of Education v. Page*, 211 N.E.2d 361 (1965).

25. Ibid., and Becker v. Board of Education, 138 N.W.2d 909 (1965).

26. According to a report by the National Education Association, in 1950 the school boards in 72 percent of the districts reporting had final authority in budgetary matters. National Education Association, Fiscal Authority of City School Boards (Washington, D.C., 1950).

27. Charles E. Reeves, School Boards: Their Status, Functions and Activities (New York: Prentice-Hall, 1954), p. 45. Also see preceding section in this chapter on state powers.

28. People v. Dupuyt, 71 Ill. 651.

29. Los Angeles School District v. Longdon, 148 Calif. 380, 83 Pac. 248 (1905).

30. Borough of Wilkinsburg v. School District of Wilkinsburg, 365 Pa. 254, 74 A.2d 138 (1950).

31. Schmutz v. Special School District, 78 Ark. 118, 121-122, 95 S.W. 438 (1906).

32. State v. Haworth, 122 Ind. 462, 23 N.E. 946 (1890).

33. Box v. Duncan, p. 222.

34. Finley v. School Dist. No. 1, p. 415.

35. Hersey v. Neilson, p. 141.

36. State ex rel. v. McGraw, 74 Mont. 156, 240 P. 812 (1925).

37. Jay v. School Dist No. 1, 24 Mont. 232, 61 P. 250 (1900).

38. Pierce, Federal, State and Local Government, p. 23; U.S., Department of Health, Education and Welfare, Office of Education, Projections of Educational Statistics to 1976-77 (Washington, D.C., 1967), p. 62. Cited hereafter as U.S. Office of Education, Projections.

39. Montana Taxation-Education Commission, Public Schools of Montana (Nashville, Tenn.: George Peabody College for Teachers, 1958), p. 63; and Montana, Annual Report

of the Superintendent of Public Instruction to the Governor of Montana for the Fiscal Year Ended June 30, 1971 (Helena, 1971).

40. Montana, Commission on Executive Reorganization, Education Report (Helena, 1970), pp. 7-29.

41. Ibid., p. 43, and G. Homer Durham, The Administration of Higher Education in Montana (Helena: Montana Legislative Council, 1958), p. 129.

42. U.S. Office of Education, Projections, pp. 62-67; Douglas M. Knight, ed., The Federal Government and Higher Education (Englewood Cliffs, N.J.: Prentice-Hall, 1960); R.L. Johns, "The Economics and Financing of Education," Emerging Designs for Education, ed. Edgar L. Morphet and David L. Jesser (Denver: Designing Education for the Future, 1968), p. 214.

43. R. Dentler, "Educational Disadvantage and the New York State Constitution," Modernizing State Government: The New York Constitutional Convention of 1967, Proceedings of the Academy of Political Science 28 (1970): 122.

44. James B. Conant, Shaping Educational Policy (New York: McGraw-Hill 1964), p. 17.

45. Myron Lieberman, The Future of Public Education (Chicago: University of Chicago Press, 1960).

46. This topic is discussed in detail in Chapter IV of this study.

47. The Council of State Governments, The Book of the States: 1966-67 (Chicago, 1966), p. 275.

48. Harvey Mansfield, "Functions of State and Local Governments," The 50 States and Their Local Governments, ed. James W. Fesler (New York: Alfred A. Knopf, 1967), p. 130.

49. Ibid., p. 133.

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NOTES

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CHAPTER VII

HIGHER EDUCATION

Higher education occupies a distinctly separate position in the educational system. The structures and functions of higher education have developed in a way fundamentally different from those of primary and secondary schools. The public school system,[1] as has been seen, is organized around the local school and school district and is designed to provide universal basic education. Institutions of higher education, on the other hand, serve a much broader constituency (usually statewide) and provide specialized avenues of training.

The character of higher education is changing rapidly, a fact which makes it difficult to summarize its central functions. The traditional activities of providing professional education and conducting research certainly remain an important part of the work of higher education. In addition, however, other more recent functions have been integrated into the framework of higher education, such as adult education, cultural activities which enhance community life, extension of the public educational system through community and junior colleges, vocational education and provision of public discussion forums.

Apart from the proliferation of courses of study and community services, however, discussion has arisen among educators and the public concerning the function of higher education at a more fundamental level. This discussion revolves around the question of the relationship between institutions of higher education and society as a whole. One school of thought holds that colleges and universities (leaving aside for the moment other forms of post-secondary education) should perform solely the role of a service unit to society, that is, provide whatever skills and knowledge are necessary to the smooth running of the state. Others maintain, to the contrary, that the most important task of a university is to provide intellectual leadership from a relatively free and objective standpoint.

The former argue that the main function of a university, like the public school, is to serve the society which supports it. In the case of the university, this means teaching the professional skills and conducting the research commissioned and paid for by the state or private industry. The university, they reason, should contribute its part to the efficient operation of the social system in a manner directed by the officials of that system.

The latter reply that it is not in society's own interest to reduce higher education to the position of simply servicing the other parts of the social system. While the state may gain some efficiency from a tightly controlled educational system, it will lose the flexibility and far-sightedness provided by an independent academic community. Only if universities act as equal and independent advisers, rather than as tools, of the state, they argue, can a society maintain its openness to change and the freedom of thought necessary to the survival of the democratic state. The difficulty with the "service" concept of higher education, one noted educator observes, is that it takes society as given and asks the university to supply the materials for its own uncritical reproduction:

> This is really the old service station, refurbished with plush lounges, fluorescent lights, and gaudier signs in bigger words. Whatever the society wants, the university will do, provided it gets the money to pay for it. And it is not even what the society wants. It is what the most vocal pressure groups demand.[2]

Of course the positions for and against the "service" concept of the university are exaggerated purposely in the debate, and the real form of any university system has elements of both service and independence. However, the question of emphasis is important, and decisions made at the constitutional level on the definition and structuring of higher education can have a powerful influence on weighting the scales in favor of one or the other position.

ESTABLISHING HIGHER EDUCATION

Constitutional establishment of higher education is not universal among the states. While every state includes some provision for a public school system in its constitution, eight state constitutions are silent on the subject of higher education (Delaware, Indiana, Maryland, New Jersey, Pennsylvania, Rhode Island, Vermont and Washington). In addition, five others (Arkansas, Illinois, Tennessee, Ohio and West Virginia) mention higher education only incidentally. The Model State Constitution reflects this lack of uniformity in its education article and in the accompanying commentary:

> Article IX, Section 9.01. Free Public Schools; Support of Higher Education. The legislature shall. . . establish, organize and support. . . public educational institutions, including public institutions of higher learning, as may be desirable.
>
> Comment. A system of free public schools is considered of such pre-eminent importance that a special mandate to the legislature is warranted. The largely hortatory direction to the legislature to establish public institutions of higher learning need not have been included as a matter of constitutional necessity. Its inclusion can do no harm, however, and may advance the cause of public higher education. There can be no doubt, of course, that no special constitutional authorization is needed for the establishment of state universities, since the state government has plenary powers, except as constitutionally limited, to govern the state and to provide services necessary for the general welfare.[3]

It is difficult to discern on what basis the National Municipal League makes the sharp distinction between the constitutional needs of public schools and those of institutions of higher learning. The argument advanced for the "largely hortatory" character of the provision on higher education--that the state government has plenary powers to govern and to provide for the general welfare--of course would apply also to public schools. The claim that "a system of free public schools is considered of such pre-eminent importance that a special mandate to the legislature is warranted" is not self-evident. As pointed out in the beginning of this study, there is no absolutely compelling reason why education must be included in a constitution at all. However, to the degree that educational provisions are included, the "pre-eminent importance" of public schools would not seem to exceed that of institutions of higher education.

Aside from the question of relative importance of higher education in the educational system, there are several arguments for inclusion of provisions on higher education in a constitution:

1. Constitutional establishment gives recognition to the special status of higher education and its particular relationship to the state.

2. Constitutional establishment provides a fundamental protection of educational institutions from politically motivated interference in the educational process. This is

essential both to the development of high quality institutions and to the preservation of academic freedom.

3. Constitutional provisions on the financing of higher education provide an important safeguard for the maintenance of that part of the educational system which is almost totally dependent on the state for support.

The primary arguments offered against constitutional establishment of higher education are as follows:

1. A constitution need only contain a minimal provision on general education. The state retains power to provide for specific parts of the system in any event (cited above in reference to the Model Constitution).

2. The legislature should exercise direct control over education, unimpeded by constitutional limitations.

3. Flexibility in the constitution may be hindered by specifying the establishment of particular institutions.

Since most of these arguments relate more directly to questions of definition, governance and operation of the higher educational system, they are discussed further in the appropriate sections below.

Of the thirty-seven states which have significant constitutional reference to higher education, twenty-four constitutionally establish all or part of a state university system or its governing board.[4] Nine states, in addition, direct the legislature to establish and/or provide for all or part of a system of higher education.[5] Two states provide that the legislature may establish or provide for higher educational institutions.[6] One state constitutionally establishes a private university and one state creates a board to deal with school and university property.[7]

Seven of the twenty-four states which constitutionally establish a system of higher education have strong provisions granting corporate status to the system. Four of these states (Alaska, California, Hawaii and Louisiana) establish the state university as a legal corporation, and three (Colorado, Michigan and New York) establish the governing board of the state university as a legal corporation. The arguments relating to this method of establishing higher education are discussed below under "governance."

The Montana Constitution does not specifically establish a state university, but it does vest control in the hands of "a state board of education:"

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> Article XI, Section 11: The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law. . . .
>
> Article XI, Section 12: The funds of the state university and of all other state educational institutions, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. . . .

Of the states which constitutionally establish a state university or its governing board, Montana's provisions are among the least clear. The establishment of a governing board and an inviolate source of support provide a general authority interpreted by some as equivalent to constitutional establishment of the state university.[8] However, the constitutional status of the university remains in question. Alternative formulations which have been suggested are discussed in the following sections.

DEFINITION OF HIGHER EDUCATION

Part of the difficulty which arises in consideration of constitutional provisions on higher education is caused by the lack of a clear definition of what higher education in fact comprises. There exists a hazy area between secondary education, which clearly falls under the rubric of public education, and four-year colleges and universities, which unquestionably belong to the higher educational framework. In this ill-defined area lie community colleges, junior colleges, vocational schools, technical schools, adult education enterprises and other forms of post-secondary education.

The trend in the United States is clearly toward proliferation of such non-university post-secondary types of education. These institutions have arisen in response to needs for transitional and alternative modes of education beyond high school. Such needs, encouraged by increasingly rapid social and technological change, very likely will multiply demands for new forms of post-secondary education in the future. In addition to vocational schools and junior colleges, there is a growing interest in such educational institutions as those for the arts, environmental and consumer education, crafts, the communications media and philosophy and culture, as well as in summer workshops, professional refresher courses and numerous other forms of education which take place outside of normal institutional channels.

A major problem arises in attempting to deal with such institutions or programs within the existing legal framework. Of course many of them have grown up precisely as an alternative to existing forms of education and consequently have no desire to relinquish their independence by being subsumed under some bureaucratic framework. But to the degree that the state must include them in terms of relationships to the existing educational system, it must provide them with some form of legal recognition. Moreover, in the case of community colleges and vocational schools, new extensions are made to the existing state system which require constitutional or statutory definition.

The pro and con arguments concerning constitutional definition of a higher educational system are essentially the same as those for constitutional definition of an education system in general. Basically, the argument is between supplying adequate guarantees on the one hand, and retaining constitutional flexibility on the other. In addition, however, if provision is made in a constitution for the governance and financing of higher education, it is almost essential that the constitution specify what is to be governed and financed.

The Michigan Constitution, for example, clearly specifies what the higher educational system consists of and what boards shall govern its various parts. The Constitution provides for separate boards of education to govern (1) public education (one board), (2) the units of the state university (three boards), (3) all other four-year colleges (one board), and (4) community and junior colleges (one board subordinate to the state public school board) [Art. VIII, Secs. 3, 5, 6, 7]. All institutions of higher education are named in the article providing for their maintenance [Art. VIII, Sec. 4].

The Montana Constitution, by contrast, mentions only "the state university and the various other state educational institutions" [Art. XI, Sec. 11] and "the state university and. . . all other state institutions of learning" [Art. XI, Sec. 12]. In State v. Rice, the Montana Supreme Court, after citing the provision in the Montana Enabling Act of 1889 for the support of "State Normal Schools" [Sec. 17], declared:

> Beyond question the State Normal School is one of the institutions of learning to which reference is here made. . . .[9] [Art. XI, Sec. 12 of the Constitution]

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Statutory definition of the Montana university system occurs in Sections 75-8402 and 75-8403 of the Revised Codes of Montana, 1947. Community college districts are defined in Section 75-8101 as corporate entities in the form of other school districts, but under the control of the regents of the Montana university system. Post-secondary vocational education centers, on the other hand, are defined as statewide institutions under the control of the State Board of Education and administered by local boards of trustees [Secs. 75-7701, 7702, 7707].

GOVERNANCE OF HIGHER EDUCATION

As has been indicated, state constitutions vary widely in their provisions for governing higher education. Of the thirty-seven states with substantive constitutional provisions on higher education, twenty-one constitutionally establish separate boards for the control, supervision or management of higher education.[10] These twenty-one states establish a total of thirty-four boards, some states providing a separate board for each institution or group of institutions. Montana and Florida are the only two states which constitutionally provide only one state board of education for both public and higher education.

The status of the higher educational system in relation to the state legislature varies accordingly, from the weakest position in which the state university and its governing board are completely the creatures of the state legislature, to the strongest position in which the university and its board attain a relatively autonomous corporate status. Delaware and New Jersey, with no constitutional mention of higher education, are examples of the former; Alaska and Michigan, which constitutionally grant the university or its board corporate status, are examples of the latter.

The central issue which arises with respect to governance of higher education decidedly is not one of public accountability. Neither side of the debate bases its argument on whether a system of higher education should be responsible to the people; clearly, in a democratic state it must be. Rather, the basic question is what degree of direct control a legislature and/or executive should exercise over higher education. Those on one side are concerned about unnecessary political and administrative interference in the education and research process, while those on the other side are concerned with maintaining full legislative oversight of the higher educational system.

The primary arguments used by those for strong legislative or executive control of higher education include:

1. The higher educational system, like other units of the state administrative system, is part of the executive and must be controlled as such. This argument was used, for instance, by the Montana Supreme Court in State v. Brannon:

> The board of education is a part of the executive department, and is but an agency of the state government. The Legislature may prescribe the extent of the powers and duties to be exercised by the board in the general control and supervision of the University of Montana. . . . It may require research and experimental work to a greater extent than is now being carried on, ... In other words, the state may extend, and add power to its developmental arm.[11]

In this case, the court upheld an act requiring a chemistry professor at a Montana college to carry out spceial compensation work submitted to him by the Public Service Commission.

2. Central administration techniques increase the efficiency of state government and therefore should be applied to all agencies and institutions, including those of higher education.

3. The large amounts of public money spent on state institutions of higher education require close control by state government have been impelled to tighten supervision of expenditures.

4. The legislature reflects a diversity of interests which should be transmitted to the governing of higher education.

Those whose concern is with strengthening the governance of higher education argue for constitutional control of the system. The major points are as follows:

1. The maintenance of a high quality university system depends on its ability to carry on objective inquiry free from political or bureaucratic control. One source declares:

> We believe it significant that the two universities of the United States which probably have the most complete autonomy by Constitutional provision, the University of California and the University of Michigan, are among our outstanding state universities.[12]

Another study of the system of governance of higher education states:

> [I]t is interesting to note that no state university is included in the usual lists of institutions distinguished by the quality of their scholarship, research, and professional work, which is not vested by the constitution of its state with authority which gives it considerable independence of the fluctuating political influences of current legislative direction.[13]

2. The university, in its special position of operating on the frontiers of knowledge, requires a greater degree of independence from the whims of daily governmental activity.

> Intellectual freedom and institutional independence can hardly be separated. The climate of freedom in which teaching and learning flourish is dependent upon attitudes and conditions within a free institution which encourage rather than limit the intellectual activity of those within the university community. When either bureaucracy or partisanship infringes upon the authority of the governing board, it thereby threatens both the intellectual and institutional independence of the institution. Intellectual freedom may suffer seriously if public colleges and universities are subjected to the same controls as other state activities. Conversely, protecting the authority of boards of lay trustees from interference by the state is every bit as vital to the freedom of the university as is the preservation of freedom for teaching and research.[14]

Another source puts it this way:

> Intellectual freedom originally sprouted in an environment of institutional autonomy. It may well lose its vitality altogether if public colleges and universities are ever brought within the harness of conventional state administration.[15]

3. Placing higher education too closely under the control of state legislative and executive bodies subjects it to the threat of political manipulation. Education in general should be relatively immune from political battles; higher education

because of its primarily state rather than local character, has to be even more vigilantly defended from unnecessary interference. The long history of institutional autonomy in Michigan, for instance, dates from the establishment of the state university as autonomous in 1850 in reaction to what were described as the "shifting fortunes" of the university as it had previously been operated under direct legislative control.[16] A later decision by the Michigan Supreme Court reaffirmed the need for this autonomy:

> No more forcible argument could well be made than is found in that report for placing the entire control of the university in the hands of a permanent board, and taking it away from the legislature. . . . I quote from that report (by a legislative committee in 1840) as follows: "No state institution in America has prospered as well as independent colleges, with equal, and often with less, means. . . . State institutions. . . have fallen into the hands of the several legislatures, fluctuating bodies of men, chosen with reference to their supposed qualifications for other duties than cherishing literary institutions. When legislatures have legislated directly for colleges their measures have been as fluctuating as the changing materials of which the legislatures were composed. . . .[17]

4. The long-range planning necessary for the operation of institutions of higher education requires independence in policy-making:

> The necessity of providing for the status and control of the state system of higher education within the constitution cannot be over-emphasized. Inherent in the nature of institutions of higher education is the need for long-range planning and policy level decision making. Unlike state administrative agencies and departments, a system of higher education cannot function effectively within the narrow limitations of excessive control by external agencies. The long-range public function of higher education demands a permanence of legal status which only constitutional delineation can provide.[18]

5. Centralized administrative control is not appropriate to the needs of universities and is, in fact, less efficient than decentralized control. This argument is directed more

against executive control of expenditures than against legislative authority in the appropriations process:

> In summary, it appears that those representing the concerns of higher education agree that the governor (via the budget office) and the legislature have clear authority to decide the initial question of what portion of a state's economic resources should be committed to higher education. Such a decision is deemed a political one, and under a democratic system it must be made by elected representatives in response to public will. However, these individuals maintain that the second phase of fiscal control--the expenditure and internal allocation of state funds once they have been appropriated--is another matter. Here educators are convinced that once the legislature has spoken, fiscal control thereafter should be the responsibility of the college or university itself. Once the appropriation is made, the management of expenditures should be the responsibility of the university and thereby it can be held accountable for the use of these public funds in meeting the academic goals of the institution.[19]

Another study emphasizes the greater efficiencies of decentralized budgeting and administration:

> Economy and efficiency of administration are not well served if some distant administrative office or legislative committee must approve even the most minute details of planning and decision making. If purchasing, budgeting, and hiring must be channelled through a central state bureaucracy of pre-audits, and contract approval, the result is paralysis of operation.[20]

METHODS OF GOVERNANCE

Decisions about the relative status of higher education in the state governmental framework are manifested in the governing forms of the higher educational system. There are six general categories of constitutional provisions on the governance of higher education:

1. No provision for the governance of higher education (twenty-one states).[21]

2. Constitutional establishment of a state university only (five states).[22]

3. Constitutional establishment of a single state board for public and higher education only (three states).[23]

4. Constitutional establishment of a separate state board or boards for higher education only (four states).[24]

5. Constitutional establishment of both a state university and a governing board, but without explicit corporate status (ten states).[25]

6. Constitutional establishment of both a state university and its governing board, with corporate status granted either to the university or the board (seven states).[26]

This list graduates from the weakest form of governance from the point of view of higher education to the strongest. For example, the absence of a constitutional provision on higher education means the university and its governing body are wholly the creatures of the legislature and can be modified or abolished simply by passage of a statute. Conversely, the establishment of a university and governing body with corporate status grants the university system a relatively high degree of autonomy in the supervision and control of its own affairs. One commentator observes:

> Many would interpret the granting of corporate status to a university as the highest achievement and fullest acknowledgment of the independence of higher education. It is an acknowledgment of the freedom for objective inquiry necessary for an institution of higher education.[27]

On the whole, states are about equally divided in their provisions on the governance of higher education, with twenty-one having no constitutionally named governing body, twenty-one having constitutionally established separate boards for higher education and eight having some other provisions on governance. The constitutional provisions, however, do not always fully reflect the actual status of higher education in a state. All twenty-one states which lack constitutional provisions for governance of higher education, for example, have separate boards for higher education created by statute. Of these, several boards, such as those of Arkansas and Indiana, have evolved a kind of independent status through customs of the legislatures and judicial interpretations.

The practical operation of state governments in educational systems also can have the opposite effect, that of significantly limiting constitutional grants of power. Of the six states with provisions for the constitutional establishment of the university but not of the board, for example, only Minnesota's board has gained a substantial degree of autonomy through judicial interpretation.[28]

Moreover, a number of constitutionally established boards of higher education have had their powers limited by legislatures and restrictive judicial interpretations. Even boards with a relatively strong constitutional basis, such as those in New York, Louisiana and California, have been intermittently subjected to substantial control in certain areas by state central authorities, such as through minute itemization of appropriations, executive withholding of appropriated funds and control of building and land programs by state public works officials.[29]

Chambers lists a number of practices he considers to be "unnecessary and self-defeating infringements of institutional autonomy by state central authorities:"

1. riders and conditions attached to appropriations;
2. statehouse pre-auditing of disbursements; state auditors often exceeding their statutory authority;
3. inclusion of some or all employees within the jurisdiction of a state civil service commission or state personnel board;
4. compulsory purchasing through a statehouse office;
5. requiring a system of accounting and financial reporting so different from that used nationally by colleges and universities as to double the work involved;
6. requiring that printing and publication be contracted by a state printer or state editor;
7. prohibiting colleges or universities from using legal counsel except from the staff of the attorney general;
8. requiring student fees and other institutional receipts to be deposited in the state treasury, resulting, in some instances, in their being permanently lost to the institution.[30]

Some of these practices occur, of course, in all states, but the preponderance of them are found in states without constitutional establishment of university governance.

Constitutional provisions themselves can be weak or strong; as interpreted by the courts, they can provide varying degrees of independence for the governing board of the higher educational system. Although twenty-nine states have constitutional provisions relating to governance, one study observes that "only nine have offered a constitutional context in which the institutions have been able to exercise freedom in administrative and fiscal affairs."[31] This study classifies three states as having "quasi-independent" systems and thirty-eight (including seventeen of those with constitutional provisions on university governance) as having systems which are "totally dependent upon legislative and administrative authority."[32]

The primary ways a state can include constitutional provisions on the governance of higher education, yet retain its subordinance to the legislature, are through (1) mandate--directing the legislature to provide for a system and its governance; (2) express reservation of power to the legislature--providing that the legislature shall retain the power to regulate and manage the system, and (3) qualifying phrases--including phrases such as that the governance of the system shall be "as provided by law." All these methods have the effect of retaining the absolute power of the legislature over the governing board of a system of higher education. Their result in terms of university governance is very nearly the same as having no constitutional provision at all for the control of higher education.

On the other hand, the primary ways for constitutional provisions to establish relatively independent powers for the governing board of higher education are through (1) a broad grant of power--vesting a general power for the supervision and control of a university system in its governing body; (2) specification--itemizing specific powers granted to a governing body, and (3) confirmation--confirming rights and powers granted to a university or its governing body prior to the writing of the constitution. Although the latter two methods leave some latitude for limitation of powers through restrictive court interpretations, all three provide a relatively high degree of independence for the governing body for higher education.[33]

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Montana Situation

Provisions for the governance of higher education in Montana are somewhat unusual in that Montana is one of only two states which have a single state board of education to govern both public and higher education. The relevant constitutional provision reads:

> The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law. [Montana Const. Art. XI, Sec. 11]

The provision does not in fact specify that the board shall serve also as the governing board of the public school system, but the Montana Supreme Court ruled in State ex rel. School District No. 29 v. Cooney that this section intended for the board to serve in both capacities.[34]

A report on The Administration of Higher Education in Montana prepared by G. Homer Durham for the Montana Legislative Council in 1958 recommended that the existing State Board of Education should sit separately as the "Regents of the University of Montana" when acting on higher educational matters. The Durham report also recommended consideration of a constitutional amendment to provide greater autonomy for the university system by creating a separate Board of Regents:

> The general control and supervision of the University of Montana shall be vested in a Board of eight Regents, appointed by the Governor subject to the confirmation of the Senate, for eight year terms, each to commence the first day of July in successive years, according to law. The University is hereby constituted a body corporate and politic and its establishment, with all the rights, immunities, franchises and endowments heretofore granted or conferred are hereby perpetuated unto it under the control of said Regents.[35]

In 1959, the legislature adopted the statutory change and declared the State Board of Education to be the "regents of the Montana university system" when acting on the affairs of the university units [Revised Codes of Montana, 1947, Sec. 75-8501]. The proposed constitutional amendment also was passed by the 1959 Legislature but was kept off the ballot for ratification because of the governor's failure to sign it coupled with a subsequent court ruling that the governor's signature was required on constitutional amendments.[35]

Thus, the original constitutional language of Article XI, Section 11 remains unchanged. The phrase, "whose powers and duties shall be prescribed and regulated by law," referring to the State Board of Education consistently has been interpreted by the Montana Supreme Court in a restrictive sense. In State v. Brannon the Court declared that the phrase deserved particular emphasis:

> Observe the care employed in the construction of this sentence. The general control and supervision of the State University and the various other educational institutions are vested in the state board of education whose powers and duties shall be prescribed and regulated by law. A law may be enacted by the people exercising the initiative or by the people acting through the Legislature. In either case the power to enact a law is illimitable, except as restrained by the Constitution [emphasis by the court].[36]

Moreover, the court went on to place an interpretation of even greater dependency on the governing board:

> The board of education is a part of the executive department, and is but an agency of the state government. The Legislature may prescribe the extent of the powers and duties to be exercised by the board in the general control and supervision of the University of Montana. The Legislature may broaden the functions of the University, or any of its units. It may require research and experimental work to a greater extent than is now being carried on, and for the public benefit may require the discharge of functions in new fields. In other words, the state may extend, and add power to, its developmental arm.[38]

Similarly, the court had ruled in State ex rel. Koch v. Barret that "the state board of education was created by the legislature under the authority of the constitution (Constitution, Art. XI, Sec. 11)."[39] And in State ex rel. Veeder v. State Board of Education, the court maintained:

> This constitutional provision [Art. XI, Sec. 11] merely vests control over the state educational institutions in the board, and authorizes the legislature to define and circumscribe the powers and duties of the board.[40]

This language was repeated in a 1936 decision concerning the board's authority to construct a university building.[41] Most recently, the court in 1963 held that the legislature has restricted by statute the ability of the board to delegate its power and that this precludes college officials from contracting with teachers on behalf of the board. The court did not question the ability of the legislature to intervene in such a matter of internal supervision as the selection of faculty.[42] The cumulative effect of these decisions appears to grant the legislature virtually unlimited authority to control and supervise the university system.[43]

Some possible alternatives to present Montana provisions already have been discussed. Two recent studies of the Montana situation--"Constitutional Authority for Higher Education" by Charles Cashmore et al. and "Constitutional Control of the Montana University System: A Proposed Revision" by Laurence Waldoch--provide further analysis of the existing situation and possible alternatives.[44] The Cashmore study suggests the following as an alternative to the present provision on governance:

> Board of Regents of Higher Education. There shall be a Board of Regents of Higher Education, a body corporate which shall have exclusive management and control of the Montana University System and of all other public institutions of post-secondary education.[45]

Waldoch proposes a somewhat different provision to accomplish the same general goal.

> The government and control of the academic, financial and administrative affairs of the Montana university system shall be vested in a board of regents, who shall be selected as provided herein. The regents shall have the power, and it shall be their duty, to govern the university system as a public trust, in a manner consistent with the general laws of Montana. The legislature shall pass no law which infringes upon, diminishes or transfers to another body any of the authority provided by this section.[46]

These proposals would provide a stronger system of self-government for the university system. There are, of course, many other alternatives, depending on the goal one has in mind for the status and governance of higher education. Provisions relating to the membership and selection of the board are discussed in Part II of this study.

ELIGIBILITY

The question of who should be allowed to attend public institutions of higher education does not present great constitutional difficulty. Under federally guaranteed rights, it is clear that aside from questions of merit, public educational institutions must be open to all. The Montana Constitution makes this principle explicit:

> No religious or partisan test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student. . . nor shall any person be debarred admission to any of the collegiate departments of the university on account of sex. [Art. XI, Sec. 9]

However, two other potential restrictions on eligibility--age and financial status--are less clearly dealt with in the Montana Constitution. Section 7 of Article XI states: "The public free schools of the state shall be open to all children and youth between the ages of six and twenty-one years." This might appear at first to refer only to the public school system. However, the Montana Supreme Court made explicit reference to this section in connection with university education in its ruling in State ex rel. Henderson v. Dawson County:

> The policy of this state has always been to provide free and liberal education for the children and youths residing within its borders, from the lowest elementary branches of instruction up to and including a full university course. To this end our Constitution declares that educational institutions shall be established and supported by the state (sec. 1, Art. X, Constitution of Montana), and imposes upon the legislature a positive duty to "establish and maintain a general, uniform and thorough system of

> public free, common schools" which "shall be open to all children and youth between the ages of six and twenty-one years" (secs. 1 and 7, Art. XI) [emphasis added].[47]

In a later case, however, the court defined the term "public school" (the term used in Art. XI, Sec. 7) as "a school established and maintained at public expense and comprising the elementary grades, and when established, the grades of high school work."[48] Under this interpretation, provisions on age and freedom from cost in Section 7 would not apply to higher education.

In practice, there has been no distinction made with respect to age in Montana institutions of higher education. The question of free tuition is another matter. In Henderson v. Dawson County, cited above, the court clearly held that collegiate education, as well as elementary and secondary, was guaranteed to be free under the constitution. In addition, until 1971, a state law read as follows:

> Except in the law and medicine departments and for extra studies, tuition shall ever be free to all students who shall have been residents of the state for not less than one year preceding their admission to any unit of the University of Montana. [Revised Codes of Montana, 1947, Sec. 75-8601, repealed 1971]

Under this statute the Montana Supreme Court held in Veeder vs. State Board of Education that the State Board of Education could not authorize university fees for "tuition" proper--that is, "the act or business of teaching the various branches of learning"--but could sanction the collection of fees for other purposes such as extra-curricular activities, campus-upkeep and so on.[49]

But in 1971 the legislature repealed the ban on tuition charges. Section 75-8601, Revised Codes of Montana, 1947, now provides:

> Charges for tuition--waiver of nonresident fees.
>
> (1) The regents may:
>
> (a) prescribe tuition rates, matriculation charges, and incidental fees for students in institutions under their jurisdiction.

> (b) waive at their discretion, nonresident tuition for selected and approved nonresident students. . . .

Thus, the state has eliminated by law the principle of tuition-free attendance at institutions of higher education.

The constitutional issue is now clarified on the subject of free tuition for the Montana university system. A new constitutional provision would be required if one desired to reestablish the principle of free public education from elementary through university level. That raises the question of the desirability of such a provision. One study considers this issue in relation to the general problem of financial aid and equal educational opportunity:

> Free tuition is only one part of a larger problem, that of determining the precise form which increased aids to college and university students ought to take. The general idea of providing financial aid to college students rests on the assumption that financial inability constitutes one of the major obstacles to higher education for many students. . . .
>
> Many authorities who advocate free tuition also call for making higher education available to all who would desire to attend. Therefore, the problem of free tuition is closely related to the concept of equal educational opportunity as it applies to higher education. . . . It is argued that the American educational system is opposed to the idea of excluding certain students from exposure to higher education--students whose talents may otherwise never be discovered.[50]

A regent of the University of Michigan, Eugene B. Power, advocates the maximum extension of educational opportunity in higher education:

> [If] a democratic society is to preserve itself, it must educate itself. Therefore, education is a social responsibility, not a private privilege. It follows from the nature of this responsibility that the economic support of education at all levels is not a matter of personal desire but of social need. For this reason we have established in this country,

> the principle that the wealth of all the people may be used to educate the children of the state and of the nation, regardless of where their wealth may be located or where the children may reside.[51]

On the other hand, some contend higher education should be selective and should deal with financial matters on an individual basis. For example, Dr. James A. Perkins, President of Cornell, has argued:

> Before the academic bar, all students are not equal. The Academy is in the business of making discriminating judgments about human performance and because it differentiates by its own standards and regulations, it increasingly seems in defiance of egalitarian social customs.[52]

Another writer emphasizes the need for individual choice among a variety of potential paths of life:

> [T]hose who campaign for tuition-free higher education like to refer to the "great American tradition of free and universal education." Yet they ignore another--more fundamental--tradition, which emphasizes individual choice and individual risk-taking against the irreversible shaping of individual careers by socially appointed experts.[53]

The major arguments in favor of tuition-free higher education can be summarized as follows:[54]

> 1. Every reason advanced for free elementary education during the nineteenth century now may be applied to free tuition for higher education. Citizenship demands and economic considerations both require that higher education be available to all who are qualified to undertake it. Equality of educational opportunity is meaningless in the twentieth century unless economic and social barriers to higher education are removed.
>
> 2. Modern society functions through a wide variety of highly specialized and developed talents. Most scientific advances call for more brain power and less manpower. A free tuition policy enables a state to discover and develop

unusual talent wherever it is found. It enables the state to prepare enough leaders and technicians for a balanced society.

3. What has made the United States a great nation is its fluid class distinctions. Its leadership in all human endeavors is strengthened by ability regardless of birth and class. Free education has been a major source of social mobility.

4. A state may find itself exporting some of its most able residents if other states have greater opportunities for low-cost public higher education.

The primary arguments against tuition-free higher education are:

1. Free tuition means that the public generally and persons who are unable to satisfy academic admission requirements (assuming non-universal college education) must contribute to the cost of educating persons who could afford to pay for their college education.[55]

2. Free tuition will not solve the problem, since other economic barriers might still keep many students out of college. Their earnings may be needed at home. Or they might be unable to qualify for college because, growing up in a poor environment, they lack both adequate preparation and motivation for further learning. No doubt, students would be added, but the proposal would not appear to solve the basic problem of the education of the greatest numbers of those otherwise capable but financially unable. It cannot be shown whether free tuition would actually accomplish its aims for a democracy to educate itself to any materially greater extent than is true under current practices at state-supported institutions.[56]

3. The cost to the state of providing free schooling through college to all qualified students would be prohibitive. Furthermore, tuition payments provide funds used to expand and improve public education programs and facilities.[57]

4. Specific reference to free tuition would still permit the legislature to impose substantial fees in lieu of tuition.[58]

5. Obtaining a smaller proportion of its total budget from the state will increase diversity of funding for the institution, making possible greater assurance of institutional independence.[59]

CHAPTER VII

NOTES

1. The term "public school system" is used here in its common meaning, i.e., all public educational institutions through the secondary level. For the purpose of this study, all vocational and technical as well as academic training above the secondary level will be classified as "higher education."

2. Robert M. Hutchins, "The Issues," The University in America (Santa Barbara: Center for the Study of Democratic Institutions, 1967), p. 7.

3. National Municipal League, Model State Constitution, 6th ed. rev. 1968 (New York, 1963, 1968), p. 101.

4. Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Dakota, Oklahoma, Texas, Utah, Wyoming.

5. Connecticut, Kansas, Kentucky, Maine, Nevada, New Hampshire, North Carolina, South Dakota, Wisconsin.

6. South Carolina and Virginia.

7. Massachusetts and Oregon, respectively.

8. The Hawaii Constitutional Convention study on higher education, for instance, classifies Montana with the states which have constitutionally established universities. See Hawaii, Legislative Reference Bureau, Article IX: Education (Higher Education), Vol. II (Honolulu: University of Hawaii, 1968), p. 6. Cited hereafter as Hawaii, Higher Education.

9. State ex rel. Haire v. Rice, 33 Mont. 365, 385, 83 P. 874 (1905).

10. Alabama, Alaska, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Wyoming.

11. State v. Brannon, 86 Mont. 200, 208, 283 P. 202 (1929).

12. Hollis P. Allen and Conrad Briner, "A Study of the

Educational Provisions of the California State Constitution (Sacramento: Constitution Revision Commission of the California Legislature, 1966), p. 59.

13. Report by the Strayer Committee (state of California), cited in G. Homer Durham, The Administration of Higher Education in Montana (Helena; Montana Legislative Council, 1958), p. 32. Cited hereafter as Durham, Administration.

14. Committee on Government and Higher Education, The Efficiency of Freedom (Baltimore: Johns Hopkins Press, 1959), p. 6.

15. Malcolm Moos and Francis E. Rourke, The Campus and the State (Baltimore: Johns Hopkins Press, 1959), p. 315. Cited hereafter as Moos and Rourke, Campus.

16. Ibid., p. 23.

17. Sterling v. Regents of the University of Michigan, 110 Mich. 369, 755 68 N.W. 253 (1896).

18. Charles R. Cashmore, Barry L. Ljort, and Ronald R. Lodders, "Constitutional Authority for Higher Education: A Legal Analysis" (Missoula, Montana: mimeo, 1971), p. 1. Cited hereafter as Cashmore et al., "Constitutional Authority."

19. Hawaii, Higher Education, p. 16. See also Moos and Rourke, Campus, pp. 5-8 ff.; and Committee, Efficiency of Freedom, p. 15.

20. Cashmore et al., "Constitutional Authority," p. 3.

21. Arkansas, Connecticut, Delaware, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia.

22. Iowa, Kansas, Minnesota, Texas, Wisconsin.

23. Florida, Utah, Montana. (However, Florida and Utah establish by statute a separate board for higher education).

24. Georgia, Mississippi, North Dakota, South Dakota.

25. Alabama, Arizona, Idaho, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Wyoming. (Idaho establishes a single board by statute.

26. Alaska, California, Colorado, Hawaii, Louisana, Michigan, New York.

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27. Hawaii, Higher Education, p. 8; see also Moos and Rourke, Campus, p. 21.

28. Cf. Cashmore *et al.*, "Constitutional Authority," pp. 6-10, 16-35, 91-96, 119-123, 173-181 and 187, ff.

29. M.M. Chambers, *Higher Education in the Fifty States* (Danville, Ill.: Interstate, 1970), p. 16.

30. *Ibid.*, pp. 16-17.

31. Cashmore *et al.*, "Constitutional Authority," p. 4.

32. *Ibid.*

33. See Cashmore *et al.*, "Constitutional Authority" for elaboration of pros and cons of each method.

34. *State ex rel. School District No. 29 v. Cooney*, 102 Mont. 521, 525, 526, 59 P.2d 48 (1936).

35. Durham, *Administration*, pp. 35-36.

36. *State ex rel. Livingston v. Murray*, 137 Mont. 557, 354 P.2d 552 (1960).

37. *State v. Brannon*, 86 Mont. 200, 208, 283 P. 202 (1929).

38. *Ibid.*

39. *State ex rel. Koch v. Barret*, 26 Mont. 62, 66 (1901).

40. *State ex rel. Veeder v. State Board of Education*, 97 Mont. 121, 133, 33 P.2d 516 (1934).

41. *State ex rel. Dragstedt v. State Board of Education*, 103 Mont. 336, 339 62 P.2d 330 (1936).

42. *Brown v. State Board of Education*, 142 Mont. 547, 385 P.2d 643 (1963).

43. See Laurence R. Waldoch, "Constitutional Control of the Montana University System: A Proposed Revision," *Montana Law Review* 33 (1972): 84-86

44. *Ibid.* and Cashmore *et al.*, "Constitutional Authority."

45. Cashmore *et al.*, "Constitutional Authority," p. 48.

46. Waldoch, "Constitutional Control," p. 95.

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47. State ex rel. Henderson v. Dawson County, 87 Mont. 122, 132, 286 P. 125.

48. Rankin v. Love, 125 Mont. 184, 188, 232 P.2d 998, 1000 (1951).

49. State ex rel. Veeder v. State Board of Education, pp. 133-136.

50. Hawaii, Higher Education, p. 20.

51. Citizen's Research Council, Alternative Courses for the Provision of Higher Education in Michigan and Their Potential Results in Terms of Service and Cost, Report No. 3 (Detroit: Citizen's Committee on Higher Education, Subcommittee on Finance, 1964), p. 7. Cited hereafter as Citizen's Research Council, Alternative Courses.

52. New York Times, December 10, 1967, p. E-11.

53. Andre Daniere, Higher Education in the American Economy (New York: Random House, 1964), p. 128.

54. New York, State Education Department, Education and the 1967 Constitutional Convention, (Albany, 1967), p. 53.

55. Ibid., p. 25.

56. Citizen's Research Council, Alternative Courses, p. 8; and New York, Temporary State Commission on the Constitutional Convention, Education (Albany, 1967), p. 18.

57. New York, Temporary State Commission on the Constitutional Convention, Education (Albany, 1967), p. 18.

58. Ibid.

59. The Carnegie Commission on Higher Education, The Capitol and the Campus: State Responsibility for Postsecondary Education (New York: McGraw-Hill, 1971), p. 76.

PART II

STRUCTURE

This is the symbolic scheme. In reality the number of drawings is infinite. No decision is final, all branch into others.

Jorge Luis Borges
Labyrinths

[illegible]

[illegible] Commission [illegible]

[illegible] Carnegie Commission on Higher Education [illegible]

CHAPTER VIII

THE STRUCTURE OF EDUCATIONAL ADMINISTRATION[1]

In addition to the general constitutional questions discussed in previous chapters, particular issues arise concerning the administrative structure of education in a state. This is an issue area which need not be answered in the form of constitutional provisions; indeed, thirteen states have no constitutional provision relating to the administration of education.[2]

However, to the degree that administration is considered a constitutional issue, decisions must be made regarding the status and functions of at least four major parts of a state's organizational structure in education:

1. State board of education--number of boards, number and selection of members, powers and responsibilities, terms of office;

2. Chief state school officer--relationship to state board, selection, powers and responsibilities, term of office, relationship to state department of education;

3. Local boards of education--status, selection, other miscellaneous specifications;

4. Local superintendents of education--status, area of jurisdiction, selection, other miscellaneous specifications.

Any, all or none of these items may be specified in a constitution, depending upon the desired brevity or specificity and upon special considerations. Provisions may depend on decisions made on broader constitutional questions, such as centralization-decentralization, the status of higher education and the relationship between education and other state governmental functions.

One study suggests the most fundamental question regarding constitutional provisions on education is whether education is seen as a typical or an atypical governmental function.[3] If it is seen as a normal part of government activities, the study observes that the logical administrative form is an appointed officer to head the educational agency, similar to other state administrative agencies. On the other hand, if education is seen as an atypical government activity, it is argued that the logical form of administration is an elected board or boards. The trend among the states has clearly been in the direction of an elected board with an appointed chief state school officer as Table 1 shows.

TABLE 1

STATE BOARDS OF EDUCATION AND CHIEF SCHOOL OFFICERS FOR THE COMMON SCHOOL SYSTEMS, 1947-1970

	Chief method of selecting state board						*Chief method of selecting chief state school officer*					
	Elected by people		*Appointed by Governor*		*Other*		*Elected by people*		*Appointed by state board*		*Appointed by Governor*	
State	*1947*	*1969*	*1947*	*1969*	*1947*	*1969*	*1947*	*1969*	*1947*	*1969*	*1947*	*1969*
Alabama	....	....	★	★	....	....	★	★	....	....	....	....
Alaska	....	....	★	★	....	....	....	....	★	★	....	....
Arizona	....	....	....	★	★	....	★	★	....	....	....	....
Arkansas	....	....	★	★	....	....	....	....	★	★	....	....
California	....	....	★	★	....	....	★	★	....	....	....	....
Colorado	....	★	....	....	★	....	★	....	....	★	....	....
Connecticut	....	....	★	★	....	....	....	....	★	★	....	....
Delaware	....	....	★	★	....	....	....	....	★	★	....	....
Florida	....	....	....	....	★	★	★	★	....	....	....	....
Georgia	....	....	★	★	....	....	★	★	....	....	....	....
Hawaii	....	★	★	....	....	....	....	....	....	★	★	....
Idaho	....	....	★	★	....	....	★	★	....	....	....	....
* **Illinois**							★	★	....	....	....	....
Indiana	....	....	★	★	....	....	★	★	....	....	....	....
Iowa(c)	....	....	....	★	....	....	★	....	....	★	....	....
Kansas	....	★	★	....	....	....	★	....	....	★	....	....
Kentucky	....	....	★	★	....	....	★	★	....	....	....	....
Louisiana	★	★	....	....	....	....	★	★	....	....	....	....
Maine(c)	....	....	....	★	....	....	....	....	....	★	★	....
Maryland	....	....	★	★	....	....	....	....	★	★	....	....
Massachusetts	....	....	★	★	....	....	....	....	★	★	....	....
Michigan	★	★	....	....	....	....	★	....	....	★	....	....
Minnesota	....	....	★	★	....	....	....	....	★	★	....	....
Mississippi	....	....	....	....	★	★	★	★	....	....	....	....
Missouri	....	....	★	★	....	....	....	....	★	★	....	....
Montana	....	....	★	★	....	....	★	★	....	....	....	....
Nebraska(c)	....	★	....	....	....	....	★	....	....	★	....	....
Nevada	★	★	....	....	....	....	★	....	....	★	....	....
New Hampshire	....	....	★	★	....	....	....	....	★	★	....	....
New Jersey	....	....	★	★	....	....	....	....	....	....	★	★
New Mexico	....	★	★	....	....	....	★	....	....	★	....	....
New York	....	....	....	....	★	★	....	....	★	★	....	....
North Carolina	....	....	★	★	....	....	★	★	....	....	....	....
North Dakota(c)	....	....	....	★	....	....	★	★	....	....	....	....
Ohio(c)	....	★	....	....	....	....	....	....	....	★	★	....
Oklahoma	....	....	★	★	....	....	★	★	....	....	....	....
Oregon	....	....	★	★	....	....	★	★	....	....	....	....
Pennsylvania	....	....	★	★	....	....	....	....	....	....	★	★
Rhode Island(c)	....	....	....	★	....	....	....	....	....	★	★	....
South Carolina	....	....	★	....	....	★	★	★	....	....	....	....
South Dakota(c)	....	....	....	★	....	....	★	★	....	....	....	....
Tennessee	....	....	★	★	....	....	....	....	....	....	★	★
Texas	....	★	★	....	....	....	★	....	....	★	....	....
Utah	....	★	....	....	★	....	★	....	....	★	....	....
Vermont	....	....	★	★	....	....	....	....	★	★	....	....
Virginia	....	....	★	★	....	....	....	....	....	....	★	★
Washington	....	....	....	....	★	★	★	★	....	....	....	....
West Virginia	....	....	★	★	....	....	★	....	....	★	....	....
Wisconsin	No state board						★	★	....	....	....	....
Wyoming	....	....	....	★	★	....	★	★	....	....	....	....
Total	3	11	30	32	8	5	31	21	11	25	8	4

*By its 1970 Constitution, Illinois now has a state board of education which may either be appointed or elected and which appoints the state superintendent.

Source: The Council of State Governments, The Book of the States, 1970-1971, Vol. XVIII (Lexington, Ky., 1970), p. 305.

THE STRUCTURE OF EDUCATIONAL ADMINISTRATION

OVERVIEW

State boards of education in general are responsible for directing the educational activities of a state, determining minimum standards for instruction, personnel, physical operation of schools and financial support, and advising political and educational bodies on school matters. The chief state school officer generally acts as the administrative officer of the board and executes the board's educational programs and policies. The educational department normally operates as the chief state school officer's staff and acts as the administrative agency in education for the state. Local school boards and administrators exercise varying degrees of control over the operation and financing of school districts at the local level.

State Boards of Education

Twenty-four state constitutions establish state boards of education: Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia and West Virginia. These boards have varying powers and responsibilities, as described below.

Chief State School Officers

Thirty-three state constitutions call for a chief state school officer: Alabama, Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Caroline, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Table 1 provides a summary of how these officers and the state boards are selected. In addition, two states provide constitutionally for a state department of education as the agency under control of the chief state school officer: Nebraska and New Mexico.

Local School Boards and Administrators

Eight state constitutions have provisions on local boards of education: California, Colorado, Florida, Georgia, Louisiana, Ohio, Utah and Virginia. In addition, twelve state constitutions call for local school officers: Arizona, California, Colorado, Florida, Georgia, Kansas, Louisiana, Mississippi, Montana, North Dakota, South Dakota and West Virginia. The two most recently passed state constitutions, Illinois (1970) and Virginia (1971), omit previously mentioned county school superintendents.

STATE BOARD OF EDUCATION

If it is decided that a state board of education should exist and that it should have constitutional status, several important questions remain: Should there be one, two or even three boards? What powers should the board(s) have? Who should compose its membership, how should members be selected and what terms should they have?

Number of Boards

Arguments concerning establishment of a separate board for higher education are dealt with in Chapter VII and therefore will not be repeated here. Only three states do not have separate boards for higher education (Idaho, Iowa and Montana); in these three states, a single board has been created to act in both areas. In all other states except Wisconsin (which has no state board for public education), two or more state boards are established by a wide variety of constitutional and statutory means.

Powers and Responsibilities

The determination of a board's powers and responsibilities depends upon the broader framework envisaged for education in a state; the more independent the educational framework from the rest of state government, the stronger the powers of the board, and, conversely, the more education is seen as an integral part of the executive branch, the weaker its powers. In addition, if two boards are established, their powers may differ greatly; for example, a higher education board generally exercises more direct control over a university system than does a state board over a public school system characterized by strong local autonomy. However, it is difficult to generalize from state to state, and the following list of major functions of a state board of education only suggests a summary of state board activities applying to some but not all state boards:

1. Complying and Executing--carrying out provisions of constitutional and statutory law, including such matters as school elections, taxation, purchasing; adopting a budget for educational activities directly under its jurisdiction;

2. Policy-Making--establishing goals, formal rules and and regulations; providing directives to the chief state school officer, school administrators, and teachers; setting minimum standards;

3. Supervising and Evaluating--inspecting physical plants and reviewing program activities in curriculum and instruction;

4. Advising and Interpreting--reporting on the condition of education in the state; submitting to the governor and legislature recommendations regarding the improvement of education;

5. Judging--hearing appeals from action taken by the chief school officer or by other administrators relating to regulations, employment, teacher certification and so forth;

6. Coordinating--cooperating with federal, state and local agencies and with educational organizations to further the cause of education and facilitate the operation of public schools;

7. Appointing--appointing and establishing the compensation of the chief state school officer (twenty-five states); alternatively, the board may act primarily as an advisory body to the chief state school officer.

This list is neither universal nor exhaustive but suggests the broad areas of activity of state boards of education. A notion of existing and desired powers and responsibilities of the boards is important in constitution-writing because the structure of the state education system depends to a significant degree on the role envisaged for the state board. However, only two state constitutions actually delineate such powers beyond a broad mandate such as "control and supervision." Such specification generally is thought to be a statutory matter.

Membership: Method of Selection

Approximately half of the state constitutions provide the method of selecting the state board of education or the board of higher education; almost all of those constitutions which establish boards of education also specify how their members are to be selected (exceptions are California, Idaho, Illinois, Ohio and Texas). Among all the states (including those which establish the board by statute), the primary means of selection are direct election (eleven states) or gubernatorial appointment (thirty-three states). Two states allow for election of the board by the legislature, and three states have boards composed entirely of ex officio members. One state has no state board. As Table 1 indicates, there has been a distinct trend in recent years toward election of the state board; the number of elected boards has increased from three in 1947 to eleven in 1969. Hawaii, for example, established an appointed board in its constitution of 1959 and changed this to an elective board in the new constitution of 1969.

Two general limitations apply to consideration of the method of selection of the state board of education. First, to the degree that the state board is seen to fall under the executive arm of state government and the "short ballot" is the desired form of state elections, then the appointive method becomes a consequence of these considerations. Secondly, a practical incompatibility of both an elected board and an elected chief state school officer is suggested by the fact that only one state (Louisiana) has such an arrangement. The ambiguity in power relationships resulting from having two chief administrative entities, both responsible to the people, seems to preclude an elective board if the chief school officer is elected, and vice versa. Beyond these two conditions, however, the merits of an elective versus appointive state board remains debatable. The following section presents the fundamental arguments on both sides.

The Case for an Elective Board[4]

> In view of the desire to keep education wholly accountable to and directly responsive to the will of the people, the structural arrangement which best satisfies this is an elected board of education which appoints its own administrative officer. It also reflects the idea of separating policy making and administrative functions. Additionally, staggered terms are often recommended on the basis of educational policy being distinctive enough to transcend the term of any governor, and to achieve continuity in educational policy making. Commentators in the field contend that there must be a body which bridges the gap from one state executive to another and from one legislature to the next. These proponents also argue that partisan political considerations should not be permitted to influence the

educational well-being of our youth, and therefore recommend nonpartisan elections.[5] If board members are elected on a nonpartisan basis, then this arrangement further reflects the desire to separate education from partisan politics.

Members of school boards are constitutionally elected directly by the people at the polls, or indirectly either by the legislature or by electing other government officials, such as the governor, superintendent of education, attorney general, treasurer, etc., who then serve in an ex officio capacity as the state school board. There is no state constitution which establishes a nonpartisan elected state board of education. Of seven state constitutions which provide for an elected board (Colorado, Hawaii, Louisiana, Michigan, Nebraska, New Mexico, and Utah), only one indicates whether the members are to be elected on a partisan or nonpartisan basis. In Michigan's document, candidates for the school board are nominated by party convention. The remaining six states only designate that board members shall be elected. Two other states, New York and South Carolina, have constitutions which provide for an indirect election of board members. South Carolina's document provides for a delegation of counties within each judicial circuit to nominate members who are then elected by the legislature. New York's board of regents are constitutionally elected by the legislature also on the basis of judicial districts.

Three other state constitutions establish an ex officio board of education. Florida's document lists the board's membership as: the governor, superintendent of education, secretary of state, attorney general and the treasurer. Mississippi's document lists the board membership as: the attorney general, secretary of state, and the superintendent of education. Oklahoma's constitution designates the governor, secretary of state, attorney general, and superintendent of education as the state board. In all three states, these state officials are elected, including the superintendent of education.

Of the seven state constitutions with directly elected boards, six allow the board to appoint its superintendent of education. Louisiana's document provides for the election of this official. Of the two states (New York and South Carolina) with an indirectly elected board, South Carolina's document provides that the superintendent of education be elected on a partisan basis whereas New York's document is silent on this matter.

It appears that the only consistent feature of a structural arrangement which reflects education as an atypical function is an elected board. The mechanics of how this should be achieved, i.e., direct or indirect election, partisan or nonpartisan election, and the role of the administrative officer to the board varies from state to state.

Nonpartisanship. Most students of school administration call for a removal of education from partisan politics. These individuals agree that school board members should be elected by popular vote at nonpartisan elections. The reasons given are that board members should feel no allegiance to any political organization or interest group and party members should not be rewarded with positions on the professional or other staff of the school system.[6] One study has stated that:

> . . . the principles of nonpartisanship . . . can likely be better served by an elected school board than an appointed one . . . Under an appointive system, it would be difficult indeed for any governor to resist the forces of partisan pressure to make political gain on his appointments. Under the elective system the public itself becomes the guardian of nonpartisanship to protect its own best interests; recognizing that no one group or party can lay exclusive claim to children and their education. In the long run, the tradition of nonpartisanship can best be further developed and protected by a continuous education of the electorate to think of educational matters as separate both from routine administration concerns and from partisan politics.[7]

Another writer has stated:

> . . . It is generally held by persons interested in public education that school boards should be nonpartisan rather than partisan or bipartisan. The schools have their own peculiar problems which are not in any sense related to the issues defined as Republican or Democratic. Political considerations should have no weight in the selection of members of school boards. The schools are maintained for the education of children whose parents are of all political affiliations. Whether a person is a Republican or a Democrat has not the slightest bearing on his ability to be a good member of a school board. Political considerations should not enter into its decisions.[8]

The proponents of nonpartisanship also argue on the basis of candidate availability. The contention is that many excellent professional and businessmen are unwilling to make a campaign for office on a political party ticket because they have patients, clients, or customers in all parties.

Patronage. In discussing the advantages of an elected board in terms of separating education from political obligation and patronage, Reeves has stated:

> Election, more often than appointment, protects the schools from local politics. If appointed, members are sometimes selected for the purpose of using the schools for patronage or for the award of purchase contracts to supporters of local politicians. The use of schools for patronage purposes results in the selection of teachers and other employees for political reasons and not on the basis of their qualifications. Such selection results in less efficient teachers than would be secured if qualifications alone were the criterion of choice. Furthermore, the use of the schools for political purposes results in the misuse of school funds to the disadvantage of both the schools and the taxpayers. Any sense of obligation . . . by the members of a school board may result in the use of the schools to help to maintain the political power of the existing . . . authorities. Such misuse of the public schools demoralizes a school system.[9]

The proposition that an elective method produces a more independent acting body free from political pressure is elaborated upon by Dykes:

> . . . Elected school board members have greater independence and freedom to act in the best interests of the school system than do appointed board members. Appointed board members owe allegiance to the appointing person or body and may not be free to decide school issues solely on educational considerations. Appointed board members are susceptible to pressure by the appointing agency, which can use threat of removal from office to make its wishes prevail.
>
> Frequently, the members of the appointing agency receive office on non-educational issues and may not be sufficiently concerned about the schools and their program. Through coercion, the school board

> may find itself forced to act in the interest of these other issues, even if they are contrary to the best interests of the schools.
>
> Elected school members can steer clear of the undesirable features of local politics. A board responsible only to the people can resist political patronage . . . [10]

Students of school administration also point out the effects that political pressure and obligation have on staff relations:

> . . . An elected board is in a better position to work closely and effectively with its superintendent and professional staff than is an appointed board. The superintendent and staff are frustrated and demoralized when important educational decisions are unduly influenced by persons or groups not directly connected with the schools. Further, such decisions are usually made without the benefit of professional advice.
>
> When any group is permitted to come between the board and its staff, lowered morale, insecurity, and staff ineffectiveness result. The entire staff needs to feel a loyalty to the board and to look to it as the final authority in school matters at the local level. This is difficult to do when board members hold office at the pleasure of some other governmental authority.[11]

Public Participation. Many proponents of an elective system contend that people take more interest in their schools and in local educational issues when these issues are popularized as the result of an election campaign. Elected members are directly responsible to the people for their actions in maintaining the kind of schools the people want at a cost they are willing to pay. Under an appointive system, voters feel frustrated in securing changes in school policies and school administration.[12] An elected board draws members from more segments of the community and thereby achieves the involvement of a greater number of neighborhoods and individuals. As one writer has stated:

> Elected board members tend to be more representative of the total community than do appointed board members. Appointed board members tend to come from the business and professional elements in the community, and other segments of the community's

population may not have representation.[13]

The Case for an Appointed Board[14]

An appointed executive board as head of an educational agency reflects the idea that education is nonseparable from other governmental functions with the governor being the chief administrative officer of the state, responsible for and accountable for education. Therefore, most of the arguments advanced for an appointed board are the same as for an appointed individual. For example, on accountability, Charles E. Reeves states:

> If school board members are appointed, the appointing authority can be held fully responsible to the people for the actions of the school board, for the integrity of the members appointed, and for any misuse of the schools by the appointing authority or by the school board, for its members' political or selfish purposes.[15]

However, the difference in philosophy lies primarily in the nonseparateness of policy making and administrative functions. An appointed board, in this case, is an additional element inserted between the governor and the departmental executive officer (the superintendent). It is viewed by some as a preventive device, to provide some measure of insurance against a one-man control over education. It is viewed by others simply as a hindrance. In either case, it means a division of what was one function under a single appointed officer into two functions--that of policy making and administrative functions. Not only must this be done in order for a board to operate effectively as a departmental head, rather than as an ineffective body whose specific function is not clearly understood, but also the board must be able to appoint its administrative officer whose responsibility it is to carry out programs and policies determined by [board members]. It would seem futile for . . . board [members] to formulate educational policy if its administrative officer were not directly responsible to them. If he were selected by some other authority, he would be under no obligation to carry out the board's programs. The instance of a board functioning as a department head also differs from a single appointed officer in one further respect. When boards are used in this capacity, the reasons usually advanced are that more minds are better than one, and more importantly, that the subject matter is somewhat distinct and important enough that a representative body in the decision-making seat will better serve public needs.

There are further arguments for an appointed board which are not couched in terms of a board vs. a single individual, but in terms of an appointed vs. an elected board. Those arguments for an appointed board vis-a-vis an elected body concentrate on the issue of the caliber of individuals selected by one method over the other, and the effects upon departmental policy making and administrative functions.

Proponents of an appointed board argue that this system places men and women of highest caliber and qualification on the board. By exercising due care in selection, capable board members can be found. It is argued that many citizens hesitate to become involved in a race for public office, even if it is on a nonpartisan basis. Professional and business people, such as physicians, bankers, manufacturers, and merchants, shrink from subjecting their names and reputations to the misrepresentations that are sometimes made in political campaigns. Desiring to avoid the necessity of spending a great deal of time and sometimes money in a campaign for election, they refuse to run. These same people, however, are often willing to serve on the school board if asked to do so as a matter of civic responsibility. Appointment is considered more of an honor and such persons may be quite willing to give time necessary for effective school board service but be unwilling to take time out from their business and professional duties to seek office.[16] It is felt then that appointment for long, overlapping terms of persons deeply interested in the welfare of the public schools, from nominees selected by representatives of civic and other organizations of the city, will secure better members than a competition for school board membership via a popular election.[17]

These individuals further feel that the popular election:

> (1) invites participation by politically-minded persons or individuals with grievances against the school system who are merely interested in furthering their own ambitions and settling personal grudges, whereas, the appointive method is felt to be a safeguard against this;[18] and
>
> (2) encourages candidates for board office to develop issues having only public appeal or to make charges against the incumbent board members which have little relevance to good school programs and tend not only to discredit the schools in the

> eyes of the public but also create serious problems from the standpoint of public support, public trust and public confidence.[19]

Advocates of an appointive system argue that elected members often feel they have a mandate from the people to make changes. These changes may be those the new member has himself raised without fully understanding whether the proposed changes detract from sound educational theory and practice. One authority maintains that the desire to make changes by newly elected members is likely to result in three pernicious practices or conditions. First, the school board may be led to assume certain administrative functions that should be performed by the superintendent of schools and his staff. Second, with frequent changes in school board personnel, the superintendent of schools may find it difficult to work with new board members and be forced out, resulting in too frequent changes in the chief executive school official. Third, with continual changes in board membership, educational policies and practices may be kept in a state of flux, and consistent development of the school system may be retarded.[20]

In addition to internal difficulties, an elective system may present problems in the relationship between the school board and the executive and legislative branches of government. The executive and the legislature are elected on a partisan basis. In each election, the candidates for these offices may be committed to a certain position on issues of policy. Opponents to an elected board argue that there is no guarantee that there will be any consistency among the policy commitments regarding education of elected board members, elected legislators and an elected governor.

There will be an even greater lack of coordination within the executive branch of government if school board members are elected on a nonpartisan basis and are thereby uncommitted to any particular policy. The partisan political process is considered to be the most effective way of implementing public policy and only by making education a part of the larger party program can educational goals be realized through legislative implementation.[21] A partisan board, then, best reflects this view of coordination between the school board, the executive and the legislature.

An appointed board is constitutionally established in 5 of the 23 states which establish a state board of education. These are: Arizona, Georgia, Missouri, Virginia and West Virginia. All five states also require senate confirmation on board appointments. Two other state constitutions establish boards, the membership of which consists of appointed individuals plus other state officials. In Montana's document, an 11-member board is established consisting of the governor, attorney general, superintendent of education, and eight others to be appointed by the governor with the consent of the senate. In North Carolina's constitution, a 13-member board is provided, consisting of the governor, the treasurer, the superintendent of education, and ten others to be appointed by the governor and approved by the legislature in joint session. Eight are to be from school districts and two at large.

It is difficult to determine from the constitutional data whether these appointed boards function as heads of the state education agency. It may be assumed that those boards which select the superintendent of education may be acting as policy-making heads of the educational agency. Only the appointed boards of Missouri and West Virginia constitutionally select their administrative officer. The rest of the states mentioned above have the chief state school officer constitutionally elected at large, except for Virginia where the governor not only appoints board members but appoints the chief state school officer as well.

The constitutions of Missouri and West Virginia provide that the board shall have duties and powers as determined by the legislature and, in general, shall supervise the public school system. The constitutions of Arizona, Georgia and Montana are silent regarding [detail of] the board's powers and duties. Only North Carolina and Virginia have documents which contain any degree of detail regarding duties and functions of the state board, none of which, however, includes the selection of or relationship to the board of an administrative officer.

Summary: Pros and Cons

The arguments for an elected state board of education can be summarized as follows:

1. An elective board is stronger because it is more free to act and determine policy than an appointive board is. An elective board which appoints its own superintendent is in the strongest position to implement its policies separately from the executive arm of the government.[22]

2. An elective state board, as a unique body in state government, highlights the distinct character and needs of the educational system.

3. Election of a state board on a nonpartisan basis removes education to a large degree from politics, whereas a board appointed by the governor becomes part of the gubernatorial political campaign and the ensuing political patronage.

4. People take more interest in educational matters when issues are publicized and board members elected.[23]

5. Election, as the more democratic method, allows diverse interests to be reflected in educational policy-making.

6. An elective board is more responsive to the will of the people than an appointive board because the members are elected to represent particular policy positions.[24]

The primary arguements for an appointive state board of education include:

1. It is often possible to secure better school board members by appointment. Many qualified people who would refuse to become a candidate for election will accept the honor of an appointment.[25]

2. If members are appointed, the appointing authority can be held fully responsible to the people for actions of the board.[26]

3. The board is a body politic with certain established policies. It is desirable that the members be appointed for long, overlapping terms to provide some continuity of policy. Such long-term members will be more interested in educational matters and less involved in partisan politics.[27]

4. A board appointed by a governor is in a better position to press for needed educational improvements and support than a board constituted by other means.

5. Elected board members feel they have a mandate from the people to act on a particular issue (if the issue is one on which they ran). There are undesirable results from action of this sort: (1) Members oftentimes usurp administrative

duties of the superintendent in accomplishing the desired policy change; (2) Educational policies are kept in a state of constant flux, retarding the growth of the educational system.[28]

6. Appointment of the board leads to more efficient administration of education and state government in general.

In considering alternative methods of selecting a state school board, the final remarks of one study are worthy of note:

> In conclusion, it should be noted that no particular method of selecting heads of educational agencies will guarantee effective educational leadership. Of interest is a study of school boards and superintendents conducted by Neal Gross. He found that many school boards indulged in ineffective and even irresponsible behavior, whether these bodies were appointed or elected--partisan or nonpartisan. It was found that many school board spend a good deal of their time considering petty details rather than fundamental school problems, and that such inadequacies result only in depriving children of a first-rate education. Gross concludes that the cause of such a situation does not lie in methods of selecting board members or superintendents, but with the citizens of the community. It is the people who ultimately will decide how effectively their educational system[29] shall function. [Citations omitted]

Membership: Ex Officio Status

The other major contention regarding selection of the state board of education is whether ex officio members should sit on the board. Only five of the twenty-five states which create a state board in their constitutions provide for ex officio board membership. In three of these states, it is the ex officio membership alone which constitutes the board:

Florida: Governor (president of the board); superintendent of education, (secretary of the board); secretary of state, attorney general, treasurer.

Mississippi: Attorney general, secretary of state, superintendent of education.

Oklahoma: Governor, secretary of state, attorney general, superintendent of education.

Arguments for Ex Officio Membership

Those who propose a state board of education constituted of partial or total ex officio membership maintain:

1. Ex officio membership of government officials should promote harmonious relations in educational administration.

2. Coordination of state education activities with other state activities is facilitated.

Arguments Against Ex Officio Membership

Those who maintain that a state board of education is best served without ex officio membership of executive constitutional officials argue:

1. Administrative and policy-making functions should be separate.

2. Ex officio membership of the governor, the chief state school officer and the attorney general may tend to confuse the legislative-executive functions of policy-making and administration and may introduce unnecessary conflicts, especially for the chief state school officer.

3. Ex officio membership of people holding certain educational and/or governmental administrative positions may allow them to pursue their own narrowly vested interests.

Membership: Size, Terms and Representation

Three other characteristics of a state board of education which may be specified in a constitution are the size of the board, length of terms of office and representative character. To the degree that the second factor (terms) is included in constitutions, there seems to be general agreement on from four to eight years overlapping terms.

The size of board membership varies greatly from three members in Mississippi to twenty-three in Ohio. Seven-member boards are mentioned in twelve states. But a general trend shows a larger board emerging--one composed of from nine to thirteen members. Examples of typical constitutionally stipulated sizes for state boards of education are the following: Montana (eleven), North Carolina (thirteen), Michigan (eight), New York (fifteen), Florida (five), Oklahoma (four) and Mississippi (three).

Arguments for a Large Board

Those who believe that a state board should consist of from nine to thirteen members argue:

1. More representation is desirable. Small boards become narrow in outlook and more subject to vested interests.[30]

2. Diverse opinion on educational policy should be expressed. There is a greater chance for a larger cross-section of opinion on a larger board.

Arguments for a Small Board

Proponents of a state board with a membership of less than nine contend:

1. Large boards are unwieldy.[31]
2. No internal cliques can be formed in small boards.
3. Small boards are more efficient.[32]

Representative Character

Some constitutions specify the constituencies which board members are to represent--judicial or congressional districts for example. Because the aim of such provisions is to attain equal geographic or demographic representation on the board, it also has been argued that one of the most important constituencies in education, that of students, should be guaranteed representation in the form of voting membership on the board. Whether any or all of these matters are constitutional or statutory depends on the character of the board envisioned by its creators.

Montana Situation

Article XI, Section 11 of the Montana constitution provides:

> The general control and supervision of the state university and various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law. The said board shall consist of eleven members, the governor, state superintendent of public instruction, and attorney general, being members ex-officio; the other eight members thereof shall be appointed by the governor; subject to the confirmation of the senate, under the regulations and restrictions to be provided by law."

The Montana Supreme Court has ruled that the Constitution "vests in the state board general control over and supervision of all state educational matters, including district and high schools."[33] The board receives its numerous statutory powers and duties in Title 75, Chapter 56 of the Revised Codes of Montana, 1947.

The board is one of two constitutionally created offices for supervision of education in Montana. The other office, the superintendent of public instruction, is created in Article VII, Section 1 and assigned "such duties as are prescribed in this constitution and by the laws of the state." The assigned statutory duties are contained mainly in Title 75, Chapter 57 of the Revised Codes of Montana, 1947. The Montana Supreme Court has ruled that the superintendent, by statute, "has supervision of all public schools of the state, subject go general supervision of the state board [of education]."[34]

The Commission on Executive Reorganization found:

> In actual practice the State Board of Education exercises supervision over some educational programs and in other cases gives routine approval to actions or recommendations of the Superintendent of Public Instruction.[35]

The commission said the board devotes most of its time to the university system, a duty legislatively assigned in Title 75-5606, Revised Codes of Montana, 1947 (enacted in 1959), which designates board members as ex officio regents of the Montana University system. The board, the commission said, generally leaves most public school matters to the discretion of the superintendent of public instruction. The commission further noted that "lines of authority and control between the superintendent of public instruction and the state board of education] in regard to elementary and secondary schools are presently very unclear."[36]

The 1971 executive reorganization [Title 82A, Revised Codes of Montana, 1947] did little to clarify the authority relationships in education. The commission noted:

> Because there are two constitutional agencies involved in education, the opportunity for change by statutory means is limited. However, it is believed that, the two constitutional agencies notwithstanding efforts should be made to clarify and centralize the educational functions of the state in a single department.[37]

Although executive reorganization under Title 82A subsequently transferred the board to, and made it head of the department of education, very little actually changed. The department which the board heads includes only the Historical Society, State Library Commission and Montana Arts Council, while the public school system remains under the control of the Office of the Superintendent of Public Instruction, renamed as such in the executive reorganization act.

Several previous attempts have been made to clarify and/or modify the relationship between the state board and the office of the superintendent. In the Montana Constitution of 1884, both the state board and the superintendent were elective [Art. IX, Sec. 12 and Art. V, Sec. 2, respectively]. One of the significant alterations made in the education article of the Constitution of 1889, however, was the change from an elected to an appointed board. [Art. XI, Sec. 11]. In 1935 a constitutional amendment was proposed which also would have made the board elective, but it did not reach the ballot.

Other efforts to establish clear lines of authority in education have centered around the ex officio membership of the board. In 1949, the legislature rejected a proposed amendment which would have provided for a seven-member state board of education appointed by the governor and excluding ex officio members.

Recent studies conducted by the Peabody Commission,[38] the Durham Commission,[39] and the Legislative Council[40] all have recommended that if the present structure of the board is retained, the three ex officio members (governor, attorney general and superintendent of public instruction) be removed in order to separate policy-making from executive functions. The Peabody Report made the following statement:

> [t]he Superintendent sits as a voting member and secretary of the board, and in effect, sits in judgment of himself when the discharge of board responsibilities by the superintendent or his staff is evaluated. This is neither sound or defensible practice.[41]

In 1958, a report by the Legislative council recommended a constitutional amendment to Article XI, Section 11, to remove the ex officio members from the state board of education. The report stated that the ex officio members (at that time) all agreed with the Council that they should be relieved of their duties in order to allow them more time to operate their specific offices.[42]

Another 1958 study, The Administration of Higher Education in Montana, by G. Homer Durham, removal of all ex officio members from the state board of education.[43] In 1959, an amendment following the recommendations suggested by the previous reports was passed by the legislature. The amendment, however, was kept off the ballot for procedural reasons, and thus was never submitted to the people for a vote. Part of the amendment passed by the legislature was as follows:

> The general control and supervision of the public free common schools shall be vested in a state board of education. The said board shall consist of eight members appointed by the governor. [1959 Laws of Montana, Ch. 191].

Again in 1965, another amendment proposed the removal of all ex officio members from the state board of education by the legislature.

The Durham Report, as noted in Chapter VII of this study, also recommended consideration of a separate board of regents for the governance of higher education. This proposal was adopted by the legislature as a part of the 1959 proposed constitutional amendment mentioned above, but was never placed on the ballot. There has been little attention paid in the studies of the structure of Montana education to the questions of board size and terms of office, suggesting that the existing provisions are deemed satisfactory.

Alternatives Facing the Convention

With respect to the structure and powers of the state board of education, the primary alternatives facing the Constitutional Convention can be phrased in terms of the following questions:

1. Should there be a constitutional provision establishing the state board(s) of education?

2. If there is to be such a provision, should it create one or two (or more) state boards of education?

3. Should such board or boards be elective or appointive (or selected by some other means)?

4. Should the powers of the board or boards be specified in the constitution? If so, what should they be?

5. Should ex officio members sit on the board or boards? If so, in what capacity?

6. How many members should the board(s) have? What should be their terms of office?

CHIEF STATE SCHOOL OFFICER

The other major component of a state educational administrative framework is the chief state school officer, variously referred to in state constitutions and statutes as the superintendent of education, superintendent of public instruction or commissioner of education. The Montana title, superintendent of public instruction, will be used in this discussion. Every state provides for the position of state superintendent either by constitution or statute. New York established the first such position in 1812. By the beginning of the twentieth century, all states had either constitutional or statutory provision for a state superintendent.

Beginning with modest responsibilities, the position of state superintendent has evolved until today it has considerable power and responsibility in many states. However, other states have given the position little responsibility or status, and the position seems to vary in accordance with the strength of the state board of education and the functions of the executive branch in each particular state. In most if not all states, the superintendent heads the largest state agency, the education department, which employs more personnel and spends more money than any other single state administrative agency.

Thirty-three state constitutions establish the office of state superintendent of schools, but almost none mentions the functions of such an official. The powers, functions and duties of the superintendent generally are found in the statutes; they deserve mention here because their scope gives a clearer idea of the superintendent's role in public education and the nature of his working relationship with the state board of education.

Activities of the chief state school officer may vary from serving as administrative assistant to the policy-making board and chief executor of the board's policy to functions in a much broader capacity, sometimes involving discretionary authority, policy-making functions and service as chairman (rather than administrative assistant) of the state board of education.

Generally, though, it might be said that the superintendent acts as the chief administrative agent to the policy-making board. As the employer of a large, professionally trained staff, the chief state school officer is the agent responsible for general supervision of all public school matters, and is accountable to the board. In addition to carrying out those administrative functions specifically delegated by the board or provided for in legislation, the superintendent serves as coordinator between the public educational system and the state board of education. Charles Reeves points out:

> As a trained expert in school administration, the superintendent should fulfill the important function of rendering his informed opinion, and furnishing professional advice to the board on matters of policy that he believes need to be considered by it for adoption, modification or repeal.[44]

Usually the superintendent's functions are greater in number and broader in scope than those of the state board of education with respect to the administration of public education. Truman M. Pierce has outlined many of the areas in which the chief state school officer may function:

1. Executive officer of the state board of education;

2. Executive administrator of the state department of education;

3. Overall supervisor of the public school system;

4. Coordinator of the state department of education with policy formulated by the state board of education;

5. Administrator responsible for preparation of curriculum guides, courses of study, issuance of teacher certificates, enforcement of standards, direction of budgets;

6. Distributor of state funds (according to the constitution and statutes);

7. Interpretor of school law;

8. Adjudicator in appealed controversies of local school boards;

9. Spokesman in matters concerned with school policy, educational aims and media.[45]

In view of these myriad responsibilities, three major questions arise with respect to the constitutional status of the superintendent. First, should the office of the superintendent be included in a constitution at all? Secondly, if it is included, what relationship should it have to the state board of education and what corresponding powers should be constitutionally specified? Thirdly, in connection with the second question, how should the superintendent be selected?

Constitutional Establishment

A similar limitation applies to the constitutional establishment of the office of a state superintendent as that described earlier with respect to the state board of education--namely that specification of a particular office in the executive branch depends to a significant degree upon how the executive as a whole is structured. Thus, the office of the superintendent might well be treated, in terms of, for instance, the "long" or "short" ballot, in a similar fashion to other major executive officers, such as the attorney general and secretary of state. For further discussion of this issue, see the study, The Executive, in this series of reports for the Montana Constitutional Convention.

However, as noted above, the unique character of education as a state function and the particular relationship envisaged between the superintendent and the state board of education also exercise an important influence on the constitutional status of the superintendent. Therefore, further considerations are warranted.

Relationship to State Board of Education

Neither the office of the state superintendent nor the state board of education can be considered adequately without reference to the other. The general framework for education in a state must include specified roles for both bodies which have governing functions in education. If the state board exercises strong directive and policy-formulating functions, then the superintendent will function primarily as the executor of the board's will; on the other hand if the superintendent has a large amount of executive independence, then the board will operate primarily in an advisory capacity.

One important indicator of the relationship between the superintendent and the board is whether the superintendent sits on the board, and, if so, in what capacity. In all of those states in which the superintendent is constitutionally established as ex officio chairman of the board of education (Indiana, Kentucky, Mississippi, Missouri, Oklahoma, Pennsylvania and Washington), the superintendent also is constitutionally established as an elective officer, and the board is either not constitutionally established or is established only on an appointive basis. Thus, in these states the superintendent clearly is predominant. On the other hand, in all of those states (except Louisiana) which constitutionally provide for an elected state board, (Colorado, Hawaii, Kansas, Michigan, Nebraska, New Mexico, Ohio, Texas and Utah), the board itself appoints the superintendent, who either serves on the board as secretary or may not sit on the board at all. In those cases the superintendent is quite evidently subordinate to the board.

Other states have authority relationships which are not as clearly structured as these, for instance either constitutional or statutory appointment of both the superintendent and the board. As Table 1 indicates, however, the post-World War II trend is clearly in the direction of increasing policy-making of the state board vis-a-vis that of the superintendent. This is evident in the fact that the number of elective state boards of education increased from three in 1947 to eleven in 1969, while the number of elective superintendents fell from thirty-one to twenty in the same period. Moreover, the number of superintendents appointed by state boards grew from eleven to twenty-six between 1947 and 1970. Hawaii provides the most prominent example of this transition by its change in the space of ten years from an appointive to an elective state board and from a superintendent who was a voting member of the board to one who is a nonvoting secretary to the board. This trend generally is justified in terms of the need to separate policy-making from administrative functions.[46]

The actual working relationship between the superintendent and the state board is complex in any state. Professional expertise, public accountability, administrative efficiency, representation of diversity and executive and legislative influence all have bearing in varying degrees on each of the different issues confronted by the board and the superintendent. General guidelines established by constitution or by statute can only set the tone for the practical relationships, leaving the specific responsibilities to be worked out on a day-to-day basis.

Method of Selection

There generally are two methods for selecting the state super- of education. One is direct popular election, for a term usually consistent with that of the other constitutionally elected officials; the other is appointment, either by the state board of education or by the governor. At one time, the election of the chief state school officer was the method used in most of the states. Today, only twenty states use this method, and only six of these by constitutional language. Conversely, since 1947 the number of states having superintendents appointed by the state board has grown from eleven to twenty-six, with four additional states using gubernatorial appointment. In other words, in the past twenty-five years, approximately a dozen states have changed from elective to appointive methods of selecting their superintendent. No state which has changed from an elective to an appointive method has returned to the elective method.

The reason most often suggested for the apparent increase in popularity of appointment of the superintendent by the state board of education is a relatively recent change in the relationship between the chief state school officer and the state board. In the past, the superintendent, as an elected official, commonly was charged with a many policy-making functions, as well as administrative duties. But Reeves notes that:

> Just recently the state board of education has reawakened to its duty to reflect interest as a body of laymen, and formulate the broad goals, and determine the means of attaining them.[47]

With this reawakening and the addition of new duties, which are constantly increasing, the board has been required to reassess its role as policy-maker and to separate administrative functions from its own work. By choosing its own administrator, the board can insure efficient execution of its policies. However, this pattern, of change, varies from state to state, and in this like other educational matters, generalization is difficult.

Arguments for Election of the Chief State School Officer

Proponents of the elective method of selecting a state superintendent of education maintain that:

1. A popularly elected chief state school officer more directly reflects the wishes of the people.

2. The autonomy of the chief state school officer and independence inherent in the elective method facilitates efficiency and coordination.

3. An elected official is directly accountable to the electorate.

4. An elected official holding a constitutionally established office can work directly for the educational needs of the state, whereas one appointed by the governor may find himself competing with other agencies and departments for priority.

5. In Montana, an elected chief state school officer has worked with ease and advantage in the structure of state government.

6. A single elected supervisor of an educational system combines the responsiveness of elected official with a unified leadership lacking in multi-member body.

7. An elected superintendent allows for flexibility of policy with changes in administration through the elective process.

Arguments for an Appointed Chief State School Officer

Those who believe that an appointed chief state school officer, particularly one appointed by the state board of education, creates the best administrative system maintain that the appointive method affords the following advantages:

1. Appointment affords freedom from time-consuming political activities (the election system results in excessive amount of time spent on campaign activities).[48]

2. The state board of education may obtain the most highly qualified superintendent and replace incompetent ones. High qualifications thus are maintained and enforced.[49]

3. Continuity of programs is more easily established. (The turnover of staff with each new elected officer causes problems of continuity of policy, as well as technical difficulties).[50]

4. In the relationship between the state board of education and the superintendent, the locus of responsibility is clearer. Dualism in responsibility results from the election of a superintendent and either election or appointment of the state board of education. Since the state board is suppose to make policy and the superintendent is supposed to execute that policy, the board should appoint the administrator.[51]

5. Politically oriented educational officers may let political biases affect decisions in educational policy development.

6. The highest professional competence can be acquired through appointment, without losing the advantages of lay control which is retained in the state board. On this point, one commentator makes the following observations:

> [T]he chief state school officer should be appointed by the State Board of Education without regard to his residence, his "politics" or any other extraneous factor; in brief, he should be appointed wholly on the basis of his ability to direct the state's system of education . . . .[52]

The election of a superintendent:

1. Establishes residence restriction for candidates;

2. Results in a low and static salary;

3. Begets a short tenure for the officeholder;

4. Subjects the selection of candidates to the vicissitudes of politics.[53]

Lee Chamberlain and L. Kindred, proponents of the appointive method of selection, observe:

> Students of educational administration contend that the professional aspect of education should be vested in a state superintendent of schools [who] should be a trained executive responsible to the state board of education and . . . therefore should be appointed.[54]

Montana Situtation

Montana's Constitution creates the office of superintendent of public instruction [Art. VII, Sec. 1] and provides that the person who holds the office be elected on a basis similar to that for other executive officeholders:

> The executive department shall consist of a governor, lieutenant-governor, secretary of state, attorney general, state treasurer, state auditor and superintendent of public instruction, each of whom shall hold his office for four years . . . The officers of the executive department, excepting the lieutenant-governor, shall during their terms of office reside at the seat of government, where they shall keep the public records, books and papers. They shall perform such duties as are prescribed in this constitution and by the laws of the state . . . [Art. VII, Sec. 1].
>
> The officers provided for in section 1 of this article, shall be elected by the qualified electors of the state . . . [Art. VII, Sec. 2]
>
> No person shall be eligible to the office of governor, lieutenant-governor, or superintendent of public instruction, unless he shall have attained the age of thirty years at the time of his election . . . [Art. VII, Sec. 3]

The superintendent of public instruction has no constitutional grant of power except as a member of the state board of education [Art. XI, Sec. 11]. The many specific powers, functions and duties of the superintendent are defined by statute, generally Sections 75-5704 to 75-5709 of the Revised Codes of Montana, 1949. One of the more important grants of power is found in Section 75-5709, where the superintendent is given discretionary authority in appeals from local school board controversies.

For further discussion of the duties and powers of the Montana superintendent of public instruction, see the study on the executive in this series of reports for the Montana Constitutional Convention.

There have been many unsuccessful attempts in Montana to change the status of the superintendent of public instruction from elective to appointive. Fifty years ago, Governor Joseph Dixon stated: "Let us nominate and elect the chief executive of the state, then give him full power to name his assistants in administering the various departments of state government . . . "[55] This proposal, which was not adopted, would have had the superintendent appointed by the governor. In 1927, the concept of an appointed superintendent of public instruction found its way to the Montana Legislature. An amendment which would have had the superintendent appointed by the state board of education was rejected.

In 1947, although no constitutional amendment affecting the mode of selecting the superintendent of public instruction was proposed, report of the Joint Committee on State Governmental Organization stated: "Present day administrative reorganization is providing for fewer elective officials, usually only three including the governor."[56]

In 1958, the Peabody Report stated that the "average lay voter cannot judge the professional competence of the candidate [for superintendent of public instruction]."[57] However, no recommendation was made by the Peabody Commission that this office be made appointive. Another study in 1958, the Durham Report, recommended that there be two governing boards for education in Montana: a state board of public instruction for public education matters and a board of regents for higher education, composed either of ex officio members from the other board or of independently selected members. In this framework, the Durham Report urged that the superintendent be appointed by the state board of public instruction.[58]

No amendment recommending a change in the method of selection of the superintendent appeared in the legislature the following year, although an act was passed creating the ex officio board of regents. However, in 1960, the superintendent of public instruction's biennial report pointed to the hazards of electing a superintendent of public instruction and urged that the "office of the superintendent of public instruction be removed from partisan politics."[59] The solution recommended was a change from election on a partisan to a nonpartisan basis.

A Legislative Council report in 1962 recommended that the governor's authority over the executive branch should be implemented by eliminating most elective officials including the superintendent of public instruction.[60] In 1969, a Montana Constitution Revision Commission subcommittee included the superintendent in its recommended change from election to appointment of all major state executive officials (except the lieutenant governor) by saying:

> The cornerstone of the proposed executive article is the limitation of elective officials to two: the governor and the lieutenant governor who would be elected jointly to four year terms.[61]

Clearly, questions of election or appointment of the state superintendent and, of the superintendent's relationship to the executive branch of government have been seen as part of the overall question of the structure of the executive arm. Thus, fundamental considerations in the status of the state superintendent have to do with the framework specified in the executive article of a constitution. This need not be controlling, however, because the office of the superintendent can be removed from the executive article and placed in the education article.

If the office of the superintendent were established in the education article, then the need would be even greater to specify the formal relationship between the superintendent and the board of education. As noted previously, the relationship in Montana between the state board and the state superintendent is particularly unclear. Inclusion of the superintendent's office in the education article still would require resolution of the issue of whether the superintendent should be elected, appointed by the board or appointed by the governor. Specification also would be called for of whether the superintendent should sit on the board as a voting member, and if so, in what capacity.

The form chosen for the executive branch as a whole also might determine the relationship between the state superintendent and the state bureaucratic framework for the administration of educational programs. In Montana, a state department of public instruction was formerly created by the following statute:

> For the purposes of organization of the staff and administration of the duties and services of the superintendent of public instruction, there is hereby created under the office of the superintendent of public instruction a department of public instruction, of which department the superintendent . . . shall be the executive and administrative head. [Revised Codes of Montana, 1947, Sec. 75-1301, since repealed].

The 1971 Montana executive reorganization act did not include the constitutionally elective executive offices in the reorganization of the executive departments. The former department of public instruction, however, found itself in a somewhat nebulous situation. As an office headed by an elected official (the state superintendent), which provided to some degree the staff of that official, it would seem to possess the same measure of independence as the staffs of other elected officials. On the other hand, as the largest state department, both in terms of finances and personnel, and one which is responsible for the administration of a major state program, it supplied significant grounds for treatment as a state executive agency, rather than as the staff of an elected official. The issue resulted in the creation of two offices: (1) a department of education, comprising the Montana Historical Society, the Board of Regents, the Montana Arts Council, and the Montana State Library Commission; and (2) the office of the superintendent of public instruction, which essentially consists of the former department of public instruction, including the major administrative, regulatory, leadership, research, planning, advisory and service functions for the administration of education in Montana.

The specification of the functions of state education departments or staffs in universally seen as a statutory matter (only two state constitutions even mention such a department). However, the relationship among the superintendent, the staff, office, or department of education and the other executive offices of state government affects the relationship between the superintendent and the state board. A superintendent with his own large staff is in a stronger position in relation to the board than is a superintendent who acts as the head of a state department of education.

Alternatives

The major alternatives facing the Constitutional Convention concerning the office of the superintendent of public instruction are best framed in terms of the following questions:

1. Should the office of the superintendent be established in the constitution?

2. If so, should it be established as at present in the executive article, or should it be moved to the education article?

3. Should the superintendent be elected, appointed by the state board of education or appointed by the governor?

4. What relationship should the superintendent have to the state board of education, i.e., chairman, secretary, member, nonvoting member, nonmember; what functions of the superintendent should be specified?

LOCAL EDUCATIONAL ADMINISTRATION

Local School Boards

Although education is formally a state responsibility and a function, major responsibility for operating and controlling the public schools has been delegated to the local level in all but one state (Hawaii). This delegation has been carried out primarily through statutes, but several states have constitutional provisions on local administration of schools.

Local control of education had its origins in education committees appointed by local governments. These committees eventually took a general supervisory role in public education matters at the local level. At the end of the nineteenth century, the school committees (or boards as they later were called) appointed school superintendents for administrative matters. From that time until now, the school board has been viewed as the policy-making body, and the superintendent has become the executive officer and chief administrator for the board. The dimension and scope of responsibilities of the superintendent have increased greatly in recent years from that of a clerical nature to responsibility for implementation of the board's policies and, day-to-day administrative details.

Newton Edwards, a school law authority, has commented:

> The local board of education . . . is . . . vested with far reading authority in practically all matters concerned with public elementary and secondary school education . . . The grant of powers makes the board of education a sovereign governmental body in the same class as the board of county commissioners and the city council.[63]

Because of these important functions carried out at the local level, some states have established local boards and/or administrators through constitutional provisions. Eight states provide for local boards in provisions such as the following:

> California. The Legislature shall provide for the appointment or election of the state board of education and a board of education in each county. [Sec. 7, Art. IX]
>
> Kansas. Local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards. [Article VI, Sec. 5].

> Colorado. The general assembly shall, by law provide for organization and school districts of convenient size, in each of which shall be established a board of education to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their districts. [Art. IX, Sec. 15].
>
> Utah. In cities of the first and second class the public school system shall be controlled by the Board of Education of such cities, separate and apart from the counties in which said cities are located. [Sec. 6, Art. X].
>
> Virginia. The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner . . . provided by law. [Art. VIII, Sec. 7].

Montana's Constitution does not create local school boards. This is in keeping with what appears to be a general trend toward omitting local educational provisions from state constitutions. Of the seven states which recently revised their constitutions (Alaska, Hawaii, Michigan, New Jersey, Pennsylvania, Florida and Illinois), only Florida includes a provision on local school boards [Art. IX, Sec. 4]. The Model State Constitution,[64] drafted by the National Municipal League, contains no similar provision. However, if particular emphasis on a decentralized structure of local control were desired, such a provision might be in order.

Local School Superintendents

The superintendent of schools serves as administrative head of the county or district educational system and often as the executive officer of the local board of education. Just as school boards may be based at the county or district level, the superintendent of schools sometimes is a county official and other times is a specially designated administrative officer for one or more shcool district.

Early superintendents, sometimes known as school managers, visitors or headmasters, assumed a relatively minor role in the operation of schools. However, the significance of the position became more apparent as increasingly important functions and responsibilities were assigned to it:

> Boards found it increasingly difficult to direct the administrative affairs of the schools and delegated more and more responsibility to superintendents. As the process continued, the concept that the board should be a policy-making body with the superintendent as its executive officer gradually evolved.[65]

Twelve state constitutions contain provisions for local school officers. Examples of such provisions are:

> California. A superintendent of schools for each county shall be elected by the qualified electors thereof at each gubernatorial election; provided that the Legislature may authorize two or more counties to unite and elect one superintendent for the counties so uniting. [Art. IX, Sec. 3].
>
> Virginia. [The state board of education] shall . . . divide the Commonwealth into school divisions . . . [and] certify to the school boards of each division a list of qualified persons for the office of division superintendent of schools [Art. VIII, Sec. 5].
>
> Georgia. There shall be a County School Superintendent who shall be the executive officer of the County Board of Education. He shall be elected . . . The qualifications and the salary of the County School Superintendent shall be fixed by law. [Art. VIII, Sec. 6].
>
> Colorado. There may be a county superintendent of schools, in each county, whose term of office shall be four years, and whose duties, qualifications and compensation shall be prescrived by law . . . The office of county superintendent of schools may be abolished by a county at a general election.. . . [Art. IX, Sec. 6].

Of states which recently have revised their constitutions, (Alaska, Hawaii, Michigan, New Jersey, Pennsylvania, New Hampshire, Missouri and Connecticut), none has a provision creating a county superintendent or local superintendent of schools. The Model State Constitution also contains no comparable provision. Illinois removed constitutional specification of the county superintendent in its recent constitutional convention.

Montana Situation

Article XVI, Section 5 of the Montana Constitution establishes the office of the county superintendent of schools: "There shall be elected in each county the following county officers . . . one county superintendent of schools . . . "

Accordingly, at a general election the qualified voters in each county elect by popular vote a county superintendent. Other constitutional provisions in Article XVI, Section 5 and Article IX, Section 2 specify qualifications terms, methods of filling vacancies, and so forth, for the office.

Article XVI, Section 5 was taken from Section 11, Article XIV of the 1884 constitution. In 1938 Section 5 was amended by setting the qualifications and terms of office of the county officials enumerated in the section. Numerous attempts have been made to remove the county superintendent as an elected constitutional officer; amendments introduced in 1933, 1937 and 1961 proposing elimination of this office from the constitution were rejected by the respective legislatures. In 1958, the Peabody Report of the Msntana Taxation Education Commission recommended that the legislature initiate a constitutional amendment to remove all reference to the county school superintendent.[66] In 1969, two reports, the Montana Legislative Council study or the Constitution and the Montana Constitution Revision Commission report suggested deletion of that part of Article XVI, Section 5 which creates the superintendent of schools.[67] Likewise, in 1970, a report by Dr. Vernon Sletten of the University of Montana recommended that the constitutional status of this office be abolished.[68]

The argument over retaining the constitutional status of the county superintendent of schools revolves primarily around constitutional brevity and administrative flexibility on the one hand and the importance of the office, on the other. For instance, Sletten, who calls for deletion of the office from the constitution, argues:

> Many constitutions that dictate the organizational structure of both state and local governments create an inflexibility of local government that outlives any current applicability.[69]

Others, who favor retention of the constitutional establishment of the county superintendent's office, hold that the superintendent provides a vital link to the county schools and supplies assistance to small schools without superintendents or even principals. Of course the office could still be retained by statute, but some proponents desire the protection of a constitutional provision. For further discussion of constitutional questions concerning county officials, see the local government study in this series of reports for the Montana Constitutional Convention.

CHAPTER VIII

NOTES

1. Much of the material in this chapter is adapted from research by Nancy Malee, formerly a research analyst with the Montana Constitutional Convention Commission.

2. Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Tennessee, Texas, Vermont.

3. Hawaii, Legislative Reference Bureau, *Article IX: Education (Public Education)*, Vol. I *(Honolulu: University of Hawaii, 1968)*, pp. 54-55, 71. Cited hereafter as Hawaii, *Public Education*.

4. The following is adopted from Hawaii, *Public Education*, pp. 73-77.

5. New York, State Education Department, *Education and the 1967 Constitutional Convention* (New York: University of the State of New York, 1966), pp. 16-17.

6. Hawaii, Legislative Reference Bureau, *Elected School Board* (Honolulu: University of Hawaii, 1965), pp. 7-8.

7. Special Board Committee, Hawaii Congress of Parents and Teachers, *Study of the Board of Education of Hawaii*, mimeographed (Honolulu, 1960), p. 1.

8. Charles E. Reeves, *School Boards: Their Status, Functions, and Activities* (New York: Prentice-Hall, 1954), p. 89. Cited hereafter as Reeves, *School Boards*.

9. *Ibid*., p. 88.

10. Archie R. Dykes, *School Board and Superintendent: Their Effective Working Relationships* (Danville, Ill.: Interstate Printers, 1965), p. 174. Cited hereafter as Dykes, *School Board*.

11. *Ibid*., pp. 174-75.

12. Reeves, *School Boards*, p. 87.

13. Dykes, *School Board*, p. 174.

14. Adopted from Hawaii, *Public Education*, pp. 58-61.

15. Reeves, *School Boards*, p. 89.

16. *Ibid*.

17. *Ibid*., p. 90.

18. *Ibid*., p. 89.

19. Dykes, *School Board*, pp. 176-177.

20. Reeves, *School Boards*, pp. 90-91.

21. Letter from Lyle C. Kyle, Director, Colorado Legislative Council, to Teruyuki Nozaki, Legislative Reference Bureau of Hawaii, September 28, 1965. Cited in note 22, Hawaii, *Public Education*, p. 89.

22. Reeves, *School Boards*, p. 87.

23. *Ibid*.

24. *Ibid*.

25. *Ibid*., p. 89.

26. *Ibid*.

27. Ward G. Reeder, *The Fundamentals of Public School Administration* (New York: Macmillan, 1958), p. 97. Cited hereafter as Reeder, *Fundamentals*.

28. Reeves, *School Boards*, p. 91.

29. Hawaii, *Public Education*, p. 84.

30. Cf. Reeder, *Fundamentals*, p. 204.

31. Cf. Reeves, *School Boards*, p. 29.

32. *Ibid*.

33. *State ex rel. School District No. 29 v. Cooney*, 102 Mont. 521, 59 P.2d 48 (1936).

34. *Ibid*.

35. Montana, Commission on Executive Reorganization, *Executive Reorganization, A Report to the Montana Legislative Assembly* (Helena, 1970), p. 105.

36. *Ibid*.

37. *Ibid*., p. 106.

38. George Peabody College for Teachers, *Public Schools of Montana: A Report to the Montana Taxation-Education Commission* (Nashville, Tenn., 1958). Cited hereafter as Peabody, *Public Schools*.

39. G. Homer Durham, *The Administration of Higher Education in Montana* (Helena: Montana Legislative Council, 1958). Cited hereafter as Durham, *Administration*.

40. Montana, Legislative Council, *Higher Education*, Report Number 5 (Helena: 1960).

41. Peabody, *Public Schools*, p. 3.

42. Montana, Legislative Council, *General Report Number 1* (Helena: 1958), p. 13.

43. Durham, *Administration*, p. 8.

44. Reeves, *School Boards*, p. 266.

45. Truman M. Pierce, *Federal, State, and Local Government in Education* (Washington, D.C.: Center for Applied Research in Education, 1964), p. 47.

46. Hawaii, *Public Education*, p. 80.

47. Reeves, *School Boards*, p. 89.

48. Orville Alexander, "Education," *Con-Con/Issues for Illinois Constitutional Convention* (Urbana: University of Illinois Press, 1970), p. 441. Cited hereafter as Illinois, *Con-Con*.

49. *Ibid*. and Hawaii, *Public Education*, pp. 57-58.

50. Illinois, *Con-Con*, p. 441.

51. Reeves, *School Boards*, p. 234.

52. Reeder, *Fundamentals*, p. 56.

53. *Ibid*., p. 55.

54. Lee M. Chamberlain and Leslie W. Kindred, *The Teacher and School Organization*, 3rd ed. (Englewood Cliffs, N. J.: 1958), pp. 56-57.

55. Joseph Dixon, *Message to the Seventh Legislative Assembly* (Helena: State Publishing Co., 1921), p. 20.

56. Montana, House of Reprsentatives, *House Journal of the Twenty-seventh Legislative Assembly*, p. 400.

57. Peabody, *Public Schools*, p. 3.

58. Durham, *Administration*, p. 32.

59. Montana, Department of Public Instruction, *Biennial Report* (Helena, 1969), p. 11.

60. Montana, Legislative Council, *Executive Reorganization Report Number 7* (Helena, 1962), p. x.

61. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, *Constitutional Provisions Proposed by Constitution Revision Commission Subcommittees* Constitutional Convention Occasional Paper No. 7 (Helena, 1971, p. 86. Cited hereafter as Montana, *Occasional Paper No. 7*.

62. Comparisons of the Office of the Superintendent of Public Instruction (OSPI) with the Office of the Secretary of State (OSS) and the Office of the Attorney General (OAG) show the following:

	OSPI		OSS	OAG
Fiscal Year 1971 Budget:	$ 2,818,932 $49,847,577	(operation) (administered funds)	$175,825	$212,092
Personnel	162		18	15

(Sources: Telephone conversations with the respective state offices, January 26, 1972).

63. Newton Edwards, *The Courts and Public Schools: The Legal Basis of School Organization and Administration* (Chicago: The University of Chicago Press, 1933), p. 23.

64. National Municipal League, *Model State Constitution*, 6th ed. rev 1968 (New York, 1968).

65. Dykes, *School Board*, p. 69.

66. Peabody, *Public Schools*, p. 21.

67. Montana Legislative Council, *The Montana Constitution*, Report No. 25 (Helena, 1968); Montana, *Ocassional Paper No. 7*.

68. Vernon Sletten, "The Montana Constitution and Education," mimeo (Missoula: University of Montana, 1970).

69. *Ibid.*, p. 11.

PART III

FINANCE

If a man owe a debt and Adad innundate his field and carry away produce, or, through lack of water, grain have not grown in the field, in that year he shall not make any return of grain to the creditor. . .

Prologue to
The Code of Hammurabi
King of Babylon

CHAPTER IX

FINANCING EDUCATION

Most of the issues in the field of educational financing are of a statutory rather than a constitutional nature. However, some very broad questions concerning state responsibility for supporting an educational system, equal educational opportunity and the equality of economic burden do invite constitutional treatment. These questions have been dealt with at length in previous chapters. However, one other important cluster of issues in educational financing remains to be discussed--those issues which have to do with specific alternative school finance programs.

While very few states have constitutional provisions which enter into educational financing in any great detail, many have provisions which (1) carefully avoid clauses which might restrict state flexibility in providing financial support for schools, but (2) provide some general direction to the course of school financing in a state. An example is the recently passed Illinois Constitution, which provides in Article X, Section 1 that: "The state has the primary responsibility for financing the system of public education."

An example with somewhat more specificity is Virginia's 1971 Constitution:

> The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government composing such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds. [Art. VIII, Sec. 2]

Such provisions insure the commitment of the state to adequate financing of education, indicate where the general thrust of that financing will be and allow for sufficient adaptability of the state to cope with economic and social change. The specifics of the distribution of burdens and benefits are left for the legislatures to provide according to what may be constantly changing criteria. The needs and structures of education vary from state to state; constitutional provisions vary accordingly. No single formula can anticipate the requirements of a particular state. Considerations of constitutional language should take into account the existing structure of educational financing in a state, desired goals to be attained through financing and potential alternative financing programs. What follows is a general discussion of these points in relation to Montana's system for educational financing.

GENERAL CONSIDERATIONS

Education as an Investment

The traditional view of the cost of education as a drain on society--a sort of necessary evil--is being replaced by an economic view of education as an investment in social wealth. Many economists are emphasizing that beyond the very important functions of education in developing the full personality of the individual and the competence of the citizen, there lies a fundamentally economic side of education comparable to any other investment of resources to expand an economic base. Martin O'Donoghue, for instance, has analyzed the general relationship between economic return and given levels of educational investment.[1]

Walter Heller reports:

> [P]rivate research to date suggests that the average rate of return on investment in formal education as a whole is higher than the rate of return for business investment.[2]

Similarly, John Kenneth Galbraith observes:

> [A] dollar or a rupee invested in the intellectual improvement of human beings will regularly bring a greater increase in national income than a dollar or a rupee devoted to railways, dams, machine tools, or other tangible capital goods.[3]

Howard Jones concludes:

> Over and above [the non-monetary] results of education--which by themselves are justification for the investment--are related outcomes which have an economic significance in increased economic productivity, justifying the assertion that the money invested in education results in a yield in monetary dividends which more than repays the principal invested.[4]

One study shows that the contribution of education to economic growth between 1929 and 1957 actually exceeded the contribution of physical capital in the same period.[5] Thus, there seems to be little disagreement on the causal relationship between educational investment and increases in economic productivity. It follows that tax support of education, in contrast to many other public expenditures, can be seen as a tax investment in society, rather than as a tax outlay for a nonrepayable social service.

National Trends in Support

Since 1900, there have been great increases in the total funds devoted to education, but the increase has been only moderate when viewed in terms of real dollars or as percentage of the gross national product (GNP). Werner Hirsch concludes from an analysis of educational expenditures from 1900 to 1958:

> Costs in real terms exhibit amazing stability during 1900-1958. For the years for which data are available, 1922 was the low year with $1.37 daily expenditure per pupil, and 1913 was the high year with $1.60. Over the 58 years, an overall decline of about 3 per cent was registered.[6]

Similarly, Tables 1 and 2 show that, while expenditures per pupil more than doubled between 1950 and 1965, the national expenditures for education rose only from 2.1 to 3.4 percent of the GNP.

How much should the nation spend on education? The answer appears to be the product of at least three complex factors: the importance placed on noneconomic returns from education, such as human enlightenment and an informed citizenry, the economic returns to society from educational investment and the nation's ability to provide support. On the present trends in educational support, Jones observes:

> [T]he average annual growth rate of school expenditures during the last ten years has been 1.7 times the average annual rate of increase in the gross national product. These figures attest a growing effort to support education--but it is not an extraordinary effort. There were many years in the depth of the depression when educational costs were more than 3.5 per cent of the gross national product.[7]

Jones suggests that in order to support education adequately in the future, 4 to 5 percent of the annual increase in the gross national product must be channeled into education.

TABLE 1

TOTAL AND PER PUPIL EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION IN THE UNITED STATES, SELECTED YEARS, 1949-50 to 1965-66

School year	Total expenditures	Expenditures per pupil in average daily attendance
1949-50	$ 5,837,643,000	$259
1951-52	7,344,237,000	313
1953-54	9,092,449,000	351
1955-56	10,955,047,000	388
1957-58	13,569,163,000	449
1959-60	15,613,255,000	472
1961-62	18,373,339,000	530
1963-64	21,444,434,000	573
1965-66	25,824,635,000	659

Source: U. S., Office of Education, "Progress of Public Education in the United States of America 1963-64," Report of the Office of Education, U. S. Department of Health, Education, and Welfare to the Twenty-Seventh International Conference on Public Education, Geneva, Switzerland, July 7-17, 1964 (Washington: U. S. Government Printing Office, 1964), Table 12, P. 18.

TABLE 2

THE INCREASE IN THE GROSS NATIONAL PRODUCT, SELECTED YEARS 1950-1964, AND THE EDUCATIONAL EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOLS AS PERCENT OF THE GROSS NATIONAL PRODUCT

Calendar year	Gross National product	School year	Expenditures for education	Educational Expenditures as per cent of gross national product
1950	$284,599,000,000	1949-50	$ 5,837,643,000	2.1
1952	346,999,000,000	1951-52	7,344,237,000	2.1
1954	363,112,000,000	1953-54	9,092,449,000	2.5
1956	419,180,000,000	1955-56	10,955,047,000	2.6
1958	444,546,000,000	1957-58	13,569,163,000	3.1
1960	502,601,000,000	1959-60	15,613,255,000	3.1
1962	556,199,000,000	1961-62	18,169,057,000	3.3
1964	633,500,000,000 (Est.)	1963-64	21,444,434,000	3.4

Source: Figures for the gross national product (in millions of dollars) taken from U. S. Department of Commerce, Office of Business Economics, "National Income and Product, 1963" Survey of Current Business XLV (January 1965): 15.

Whether this will occur depends on competing governmental programs in roads, space, military affairs, health and other services:

> In the final analysis the question is one of values. As a nation the United States spends more for recreation, more for transportation, and more for tobacco and alcoholic beverages than it does for education.[8]

However, education presently does hold a high position in relation to spending for other governmental activities, as indicated by Tables 3 and 4.

Sources of Support

The largest single source of revenue for educational purposes is still the local property tax. Table 5 shows that local sources of revenue for education outweigh state and national sources in most states and in the nation as a whole. Property taxes contribute approximately 87 percent of total revenue derived from local sources.[9] However, property taxes have declined substantially in this century as a producer of state and local revenue, as shown in Table 6, which provides a breakdown by source of state and local government receipts between 1929 and 1966.

Property Tax Versus Other Taxes

There is substantial disagreement among economists over the merits of the property tax as a substantial source of state and local income. Burkhead, for instance, contends that it is a viable form of taxation:

> On the whole, the statistical findings here support the conclusion that the property tax is a far better fiscal instrument than most of its critics have allowed. There is every reason to believe that it will continue to hold its relative fiscal importance in state-local public finance structures. This will be accomplished by the increases in the base of property subject to taxation and by increases in the rate of tax.[10]

On the other, Garvue catalogs many of the difficulties which arise with property taxation:

TABLE 3

TREND IN DISTRIBUTION OF TAX RESOURCES FOR SELECTED FUNCTIONS OF ALL GOVERNMENT (FEDERAL, STATE, AND LOCAL) (GENERAL EXPENDITURES IN BILLIONS OF DOLLARS)

Function	1942		1950		1960		1965		1966	
	Amount	Percentage of Total	Amount	Percentage of Total	Amount	Percentage of Total	Amount	Percentage of Total	Amount	Percentage of Total
Total	$43.5	100.0	$60.7	100.0	$128.6	100.0	$174.0	100.0	$189.4	100.0
National defense and international relations	26.6	61.14	18.4	30.31	47.5	36.93	55.8	32.06	60.8	32.10
Education	2.7	6.20	9.6	15.81	19.4	15.08	30.0	17.24	34.8	18.37
Natural resources	2.5	5.74	5.0	8.23	8.4	6.53	11.0	6.32	10.3	5.43
Highways	1.8	4.13	3.8	6.26	9.5	7.38	12.3	7.06	12.9	6.81
Interest on general debt	.2	0.45	4.9	8.07	9.3	7.23	11.4	6.55	12.3	6.49
Health	.9	2.06	.7	1.15	1.0	0.77	1.8	1.03	2.1	1.10
Hospitals	.5	1.14	2.0	3.29	4.2	3.26	5.9	3.39	6.3	3.32
Postal system	.9	2.06	2.3	3.78	3.7	2.87	5.3	3.04	5.7	3.00
Public welfare	1.3	2.98	3.0	4.94	4.5	3.49	6.4	3.67	7.0	3.69
Police protection	.4	0.91	.9	1.48	2.0	1.55	2.8	1.60	3.0	1.05
All other	5.7	13.10	10.1	16.63	19.1	14.85	31.3	17.98	34.2	18.05

Source: Statistical Abstract of the United States. Washington, D.C., Bureau of the Census, 1967.

TABLE 4

Trend in Distribution of Tax Resources for Selected Functions of State and Local Governments (General or Direct Expenditures in Billions of Dollars)

Function	1942		1950		1960		1965		1966	
	Amount	Percentage of Total	Amount	Percentage of Total	Amount	Percentage of Total	Amount	Percentage of Total	Amount	Percentage of Total
Total	$9.2	100.0	$22.8	100.0	$51.9	100.0	$74.5	100.0	$82.8	100.0
Education	2.6	28.2	7.2	31.5	18.7	36.0	28.6	38.3	33.3	39.1
Natural resources	.2	2.1	.7	3.0	1.2	2.3	1.7	2.2	2.0	2.4
Highways	1.5	16.3	3.8	16.8	9.4	18.1	12.2	16.3	12.3	14.8
Health	.2	2.1	.4	1.7	.6	1.1	.8	1.0	.9	1.0
Hospitals	.4	4.2	1.4	6.1	3.2	6.1	4.5	6.0	5.0	6.0
Public welfare	1.2	13.0	2.9	12.7	4.4	8.4	6.3	8.4	6.8	8.2
Police	.4	4.2	.8	3.5	1.9	3.6	2.5	3.3	2.8	3.3
Fire protection	.2	2.1	.5	2.1	1.0	1.9	1.3	1.7	1.4	1.8
Sanitation and sewage	.2	2.1	.8	3.5	1.7	3.2	2.4	3.2	2.6	3.1
Housing and urban renewal	.2	2.1	.5	2.1	.9	1.6	1.3	1.7	1.4	1.8
Local parks and recreation	.1	1.1	.3	1.3	.8	1.5	1.1	1.4	1.2	1.4
Interest on general debt	.6	6.5	.5	2.1	1.7	3.2	2.5	3.3	2.7	3.2
All other	1.3	14.1	3.1	13.6	6.5	12.5	9.3	12.4	10.1	12.2

SOURCE: Statistical Abstract of the United States. Washington, D.C., Bureau of the Census, 1967, p. 423.

TABLE 5

PERCENTAGES OF REVENUE ESTIMATED FROM FEDERAL, STATE AND LOCAL SOURCES, 1965-66

State	PERCENT OF REVENUE FROM		
	Federal Sources	State Sources	Local Sources
United States, total	7.8%	39.1%	53.1%
Alabama	15.4	60.8	23.8
Alaska	27.5	51.4	21.1
Arizona	13.3	36.3	50.4
Arkansas	20.1	43.4	36.5
California	6.4	38.5	55.0
Colorado	8.9	24.6	66.4
Connecticut	5.1	32.8	62.0
Delaware	5.7	75.5	18.9
Florida	9.4	48.8	41.8
Georgia	12.0	61.4	26.6
Hawaii	11.2	61.5	27.3
Idaho	7.5	38.5	54.0
Illinois	5.7	22.9	71.3
Indiana	5.7	37.1	57.3
Iowa	4.7	13.5	81.8
Kansas	8.3	21.6	70.1
Kentucky	14.2	52.0	33.8
Louisiana	6.0	69.2	24.8
Maine	10.8	29.0	60.2
Maryland	7.3	32.0	60.6
Massachusetts	9.6	22.1	68.3
Michigan	6.1	43.9	50.0
Minnesota	6.5	38.0	55.6
Mississippi	20.0	51.0	29.1
Missouri	8.5	31.8	59.7
Montana	8.0	27.9	64.1
Nebraska	7.2	5.9	86.9
Nevada	8.2	51.9	39.9
New Hampshire	6.1	10.7	83.2
New Jersey	4.5	21.2	74.4
New Mexico	13.6	65.3	20.9
New York	6.0	44.2	49.8
North Carolina	11.8	65.9	22.3
North Dakota	7.6	26.1	66.3
Ohio	5.0	27.4	67.6
Oklahoma	14.1	29.4	56.6
Oregon	7.9	26.5	65.6
Pennsylvania	7.1	41.7	51.2
Rhode Island	7.6	31.6	60.8
South Carolina	17.3	59.7	23.0
South Dakota	17.0	11.9	71.0
Tennessee	11.7	49.5	38.7
Texas	7.0	52.0	40.9
Utah	9.0	49.0	42.1
Vermont	8.3	26.2	65.4
Virginia	11.1	39.4	49.5
Washington	6.1	58.3	35.6
West Virginia	7.2	52.1	40.7
Wisconsin	7.4	23.8	68.8
Wyoming	6.3	42.0	51.7

Source: Data from National Education Association, Estimates of School Statistics, 1965-66, Research Report 1965-R17 (Washington, 1965), Table 10, p. 32.

TABLE 6

STATE AND LOCAL GOVERNMENT RECEIPTS, SELECTED YEARS, 1929-1966

	Billions of Dollars				Percentage of Distribution			
	1929	1948	1956	1966	1929	1948	1956	1966
State and local government receipts	7.8	18.4	36.4	87.9	100.0	100.0	100.0	100.0
Total tax revenues	6.4	13.7	27.0	58.7	82.4	74.8	74.1	66.8
Income taxes	.1	.6	1.6	5.4	1.8	3.1	4.3	6.2
Corporate profits tax accruals	.1	.7	1.0	2.3	1.9	3.7	2.9	2.6
Property taxes	4.7	6.1	11.8	25.1	60.1	33.4	32.3	28.6
General sales taxes[b]	([c])	2.0	4.1	10.4	([c])	10.8	11.3	11.9
Gasoline taxes	.4	1.3	2.8	4.7	5.3	7.2	7.7	5.4
Liquor taxes	([c])	.4	.6	1.0	([c])	2.4	1.6	1.1
Tobacco taxes	([c])	.4	.5	1.6	([c])	2.0	1.5	1.8
Death and gift taxes	.2	.2	.3	.8	2.1	1.0	.9	.9
Motor vehicle licenses	.3	.6	1.3	2.2	4.4	3.4	3.6	2.5
Other taxes	.5	1.4	2.9	5.1	6.9	7.8	8.1	5.8
Receipts other than taxes	1.4	4.6	9.4	29.2	17.6	25.2	25.9	33.2
Nontaxes	.9	1.2	2.4	6.2	11.6	6.3	6.6	7.1
Contributions for social insurance	.1	.7	2.0	4.9	1.5	3.9	5.5	5.6
Federal grants-in-aid	.1	2.0	3.3	14.8	1.5	10.8	9.2	16.9
Surplus of government enterprises	.2	.8	1.7	3.3	3.0	4.3	4.6	3.7
State government receipts[d]	2.4	9.8	18.8	48.0	100.0	100.0	100.0	100.0
Taxes	1.9	7.1	14.1	30.9	82.4	73.2	74.7	64.4
Receipts other than taxes	.4	2.6	4.8	17.1	17.6	26.8	25.3	35.6
Nontaxes	.2	.4	.7	2.3	9.0	3.6	3.8	4.9
Contributions for social insurance	([a])	.5	1.3	3.4	1.5	4.8	6.8	7.2
Federal grants-in-aid	.1	1.5	2.1	9.8	4.3	15.3	11.2	20.5
Local payments	.1	.1	.3	.5	2.0	1.0	1.4	1.1
Surplus of government enterprises	([a])	.2	.4	.9	.7	2.0	2.1	1.9
Local government receipts[d]	5.9	11.6	23.5	55.5	100.0	100.0	100.0	100.0
Taxes	4.5	6.6	12.9	27.8	76.2	56.6	54.9	50.1
Receipts other than taxes	1.4	5.0	10.6	27.7	23.8	43.4	45.1	49.9
Nontaxes	.7	.8	1.7	3.9	11.7	6.9	7.1	7.0
Contributions for social insurance	.1	.2	.7	1.4	1.4	2.0	3.2	2.6
Federal grants-in-aid	([a])	.5	1.2	5.0	.3	4.3	5.2	9.0
State payments	.4	2.9	5.7	15.0	6.8	25.1	24.1	27.1
Surplus of government enterprises	.2	.6	1.3	2.4	3.7	5.1	5.5	4.3

[a] Less than 0.05 billion dollars.

[b] Includes local sales taxes.

[c] Small amount included in other taxes.

[d] Total state receipts include local payments to states, and total local receipts include state payments to localities; neither type of intergovernmental payment is included above in total combined state and local receipts.

NOTE: Detail may not add up to total because of rounding.

Source: Robert J. Garvue, Modern Public School Finance; MacMillan Co., London, 1969. p. 171.

> [Property taxes] have necessitated recourse to short-term financing to cover operating deficits, which ultimately had to be funded. They have encouraged long-term borrowing for activities that might have better been financed out of current revenue. They have necessitated extensive special legislation in some states to relieve individual jurisdictions, thereby in effect shifting the local governing bodies' appropriating function to state legislatures. They have impaired the ability of local officials to budget effectively where specific limitations apply to particular governmental functions. They have imposed onerous burdens on administrative agencies and added to the already overcrowded dockets of the courts. Where property tax limitations are especially rigid and communities have reached their tax limit, assessors are often subjected to conflicting pressures from governing bodies seeking additional property tax revenue and from taxpayers who wish to prevent property taxes from rising. They are thus forced into policy-making positions with control over the level of local governmental spending.[11]

Local Versus State Support

Even more important than the disputes over particular sources of revenue (property tax or other forms of taxation) is the issue of locus of the funding authority--state or local. Traditionally, the fundamental revenue source for local schools was the school district. However, there has been a strong movement toward increased state financing of schools. The recent Serrano decision, discussed in Chapter IV, of this study, has added a great deal of legal impetus to this movement.

Plans to transfer almost all funding of the public school system to the state level are under consideration in most states.

Future decisions in the courts may make the question a moot one; however, at present the prospect of state funding is still debated. The major arguments for a change to primarily state funding of schools are based on the need for equal educational opportunity and for a sufficient and stable source of financial support. One source summarizes the points in favor of state financing as follows:

> 1. It would tend to equalize tax ratios throughout the state.

> 2. It would permit redrawing of school district boundaries into more efficient units, without so great a concern for tax consequences.
>
> 3. It would permit all districts to benefit from the taxes paid by industry.
>
> 4. The burden of tax free property in districts would be equalized.
>
> 5. It would permit local school boards and administrators to concentrate their energies on educational matters rather than the yearly fight for budgets and bond issues.
>
> 6. It would produce a level of educational opportunity that would be more equal throughout the State for all children.[12]

Critics of the move to state financing argue that such a system would detract from the quality of some schools and would remove a substantial degree of power from local school boards. These views are articulated in one source as follows:

> [State funding] would lead to greatly increased state control of public schools. It is almost axiomatic that the agency which provides the funds is in a position to exercise a large measure of control . . . .
>
> While substantially full support might improve the programs of inferior schools, it would lower the quality of education in the better schools and make it impossible for local citizens to restore these quality programs despite their willingness to do so. Local citizens might well show less interest in the welfare of their schools if they are frustrated in their efforts to improve their programs.[13]

Tax Effort

States vary greatly in their total rates of taxation and in the taxes levied for the support of education. These differing tax rates combined with large disparities in average per capita income reveal significant differences in tax efforts and in corresponding revenues available for education. Table 7 compares the states in terms of general and educational revenues as a percentage of personal income, showing a high of 8.9 percent in New Mexico to a low of 5 percent in Nebraska.

TABLE 7

EFFORTS OF THE STATES TO SUPPORT STATE AND LOCAL GOVERNMENTAL FUNCTIONS IN RELATION TO THEIR FISCAL CAPACITY, 1969

State	*Net Personal Income ($ Millions)*	*General Revenue of State and Local Governments From Own Sources*[b] *($ Millions)*	*State and Local Revenue for Elementary and Secondary Education*[c] *($ Millions)*	*General Revenue of State and Local Governments as a Percentage of Net Personal Income*	*Elementary and Secondary Education as a Percentage of Net Personal Income*	*State and Local Revenue for Elementary and Secondary Education as a Percentage of General Revenue of State and Local Governments From Own Sources*
Alabama	5,669	1,122	312	19.79 (22)	5.50 (43)	27.81 (47)
Alaska	950	183	59	19.26 (27)	6.21 (30)	32.24 (32)
Arizona	3,879	826	299	21.29 (11)	7.71 (6)	36.20 (16)
Arkansas	3,157	584	194	18.50 (30)	6.15 (31)	33.22 (27)
California	60,198	12,822	3,900	21.30 (10)	6.48 (23)	30.42 (40)
Colorado	5,233	1,052	346	20.10 (20)	6.61 (19)	32.89 (28)
Connecticut	9,626	1,394	543	14.48 (49)	5.64 (41)	38.95 (4)
Delaware	1,502	281	108	18.71 (28)	7.19 (11)	38.43 (7)
Florida	14,857	2,740	941	18.44 (31)	6.33 (27)	34.34 (24)
Georgia	9,425	1,685	541	17.88 (34)	5.74 (38)	32.11 (34)
Hawaii	2,135	466	136	21.83 (7)	6.37 (26)	29.18 (45)
Idaho	1,346	299	96	22.21 (6)	7.13 (13)	32.11 (34)
Illinois	33,992	4,898	1,831	14.41 (50)	5.39 (45)	37.38 (10)
Indiana	13,197	2,179	864	16.51 (43)	6.55 (21)	39.65 (2)
Iowa	6,889	1,352	484	19.63 (23)	7.03 (14)	35.80 (17)
Kansas	5,787	1,034	386	17.87 (35)	6.67 (17)	37.33 (12)
Kentucky	6,046	1,171	347	19.37 (24)	5.74 (38)	29.63 (42)
Louisiana	6,681	1,547	498	23.16 (5)	7.45 (9)	32.19 (33)
Maine	1,984	359	128	18.09 (32)	6.45 (24)	35.65 (20)
Maryland	10,784	1,879	729	17.42 (38)	6.76 (16)	38.80 (6)
Massachusetts	16,107	2,841	840	17.64 (37)	5.22 (48)	29.57 (43)
Michigan	24,258	4,694	1,563	19.35 (26)	6.44 (25)	33.30 (26)
Minnesota	9,391	1,954	691	20.81 (15)	7.36 (10)	35.36 (21)
Mississippi	3,048	763	239	25.03 (3)	7.84 (5)	31.32 (37)

TABLE 7 (Continued)

Missouri	11,036	1,758	609	15.93 (44)	5.52 (42)	34.64 (22)
Montana	1,476	312	119	21.14 (12)	8.06 (3)	38.14 (8)
Nebraska	3,739	693	187	18.53 (29)	5.00 (50)	26.98 (49)
Nevada	1,434	285	85	19.87 (21)	5.93 (33)	29.82 (41)
New Hampshire	1,696	263	91	15.51 (47)	5.37 (46)	34.60 (23)
New Jersey	21,834	3,406	1,248	15.60 (46)	5.72 (39)	36.64 (14)
New Mexico	1,898	473	169	24.92 (4)	8.90 (1)	35.73 (18)
New York	58,080	12,472	4,057	21.47 (9)	6.99 (15)	32.53 (31)
North Carolina	9,924	1,721	585	17.34 (39)	5.89 (35)	33.99 (25)
North Dakota	1,260	322	90	25.56 (2)	7.14 (12)	27.95 (46)
Ohio	28,278	4,196	1,499	14.84 (48)	5.30 (47)	35.72 (19)
Oklahoma	5,280	1,022	299	19.36 (25)	5.66 (40)	29.26 (44)
Oregon	5,025	1,025	403	20.40 (16)	8.02 (4)	39.32 (3)
Pennsylvania	29,954	4,739	1,842	15.82 (45)	6.15 (31)	38.87 (5)
Rhode Island	2,409	403	124	16.73 (41)	5.15 (49)	30.77 (39)
South Carolina	4,370	786	291	17.99 (33)	6.66 (18)	37.02 (13)
South Dakota	1,387	302	82	21.77 (8)	5.91 (34)	27.15 (48)
Tennessee	7,196	1,284	422	17.84 (36)	5.86 (36)	32.87 (29)
Texas	24,513	4,086	1,331	16.67 (42)	5.43 (44)	32.57 (30)
Utah	2,096	443	176	21.14 (12)	8.40 (2)	38.73 (1)
Vermont	983	198	74	20.14 (19)	7.53 (8)	37.37 (11)
Virginia	10,374	1,796	652	17.31 (40)	6.28 (28)	36.30 (15)
Washington	9,137	1,845	571	20.19 (18)	6.25 (29)	30.95 (38)
West Virginia	2,961	602	226	20.33 (17)	7.63 (7)	37.54 (9)
Wisconsin	10,792	2,262	713	20.96 (14)	6.61 (19)	31.52 (36)
Wyoming	764	196	50	25.65 (1)	6.54 (22)	25.51 (50)
TOTAL U. S.	514,043	95,011	32,069	18.48	6.24	33.75

Source: National Educational Finance Project; Alternative Programs For Financing Education. Gainesville, Florida, Vol. 5, 1971. pp. 74-75.

FINANCING EDUCATION

MONTANA SITUATION

More sections of the Education Article [Art. XI] in the Montana Constitution are devoted to educational financing than to any other single subject:

> Section 1. It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools.
>
> Section 2. The public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government known as school lands; and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the state from the general government for general educational purposes, or where no other special purpose is indicated in such grant; all estates, or distributive shares of estates that may escheat to the state; all unclaimed shares and dividends of any corporation incorporated under the laws of the state, and all other grants, gifts, devises or bequests made to the state for general educational purposes.
>
> Section 3. Such public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion, to be invested, so far as possible, in public securities within the state, including school district bonds, issued for the erection of school buildings, under the restrictions to be provided by law.
>
> Section 4. The governor, superintendent of public instruction, secretary of state and attorney general shall constitute the state board of land commissioners, which shall have the direction, control, leasing and sale of the school lands of the state, and the lands granted or which may hereafter be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be prescribed by law.
>
> Section 5. Ninety-five per centum (95%) of all the interest received on the school funds of the state, and ninety-five per centum (95%) of all rents received from the leasing of school lands and of all other income from the public school funds shall be apportioned annually to the several school districts of the state in

> proportion to the number of children and youths between the ages of six (6) and twenty-one (21) residing there in respectively, but no district shall be entitled to such distributive share that does not maintain a public free school for at least six months during the year for which such distribution is made. The remaining five per centum (5%) of all the interest received on the school funds of the state, and the remaining five per centum (5%) of all the rents received from the leasing of school lands and of all other income from the public school funds, shall annually be added to the public school funds of the state and become and forever remain an inseparable and inviolable part thereof.
>
> Section 6. It shall be the duty of the legislative assembly to provide by taxation, or otherwise, sufficient means, in connection with the amount received from the general school fund, to maintain a public, free common school in each organized district in the state, for at least three months in each year.
>
> Section 12. The funds of the state university and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss of diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions.

In addition, several sections elsewhere in the Constitution have an important bearing on educational finance. The most significant of these are Article XII, Sections 1a and 9:

> Section 1a. The legislative assembly may levy and collect taxes upon incomes of persons, firms and corporations for the purpose of replacing property taxes. These income taxes may be graduated and progressive and shall be distributed to the public schools and to the state government.
>
> Section 9. The rate of taxation on real and personal property for state purposes, except as hereinafter provided, shall never exceed two and one-half mills on each dollar of valuation; and whenever the

> taxable property of the state shall amount to six hundred million dollars ($600,000,000.00) the rate shall never exceed two (2) mills on each dollar of valuation, unless the proposition to increase such rate, specifying the rate proposed and the time during which the rate shall be levied shall have been submitted to the people at the general election and shall have received a majority of all votes cast for and against it at such election; provided, that in addition to the levy for state purposes above provided for, a special levy in addition may be made on live stock for the purpose of paying bounties on wild animals and for stock inspection, protection and indemnity purposes, as may be prescribed by law, and such special levy shall be made and levied annually in amount not exceeding four mills on the dollar by the state board of equalization, as may be provided by law.

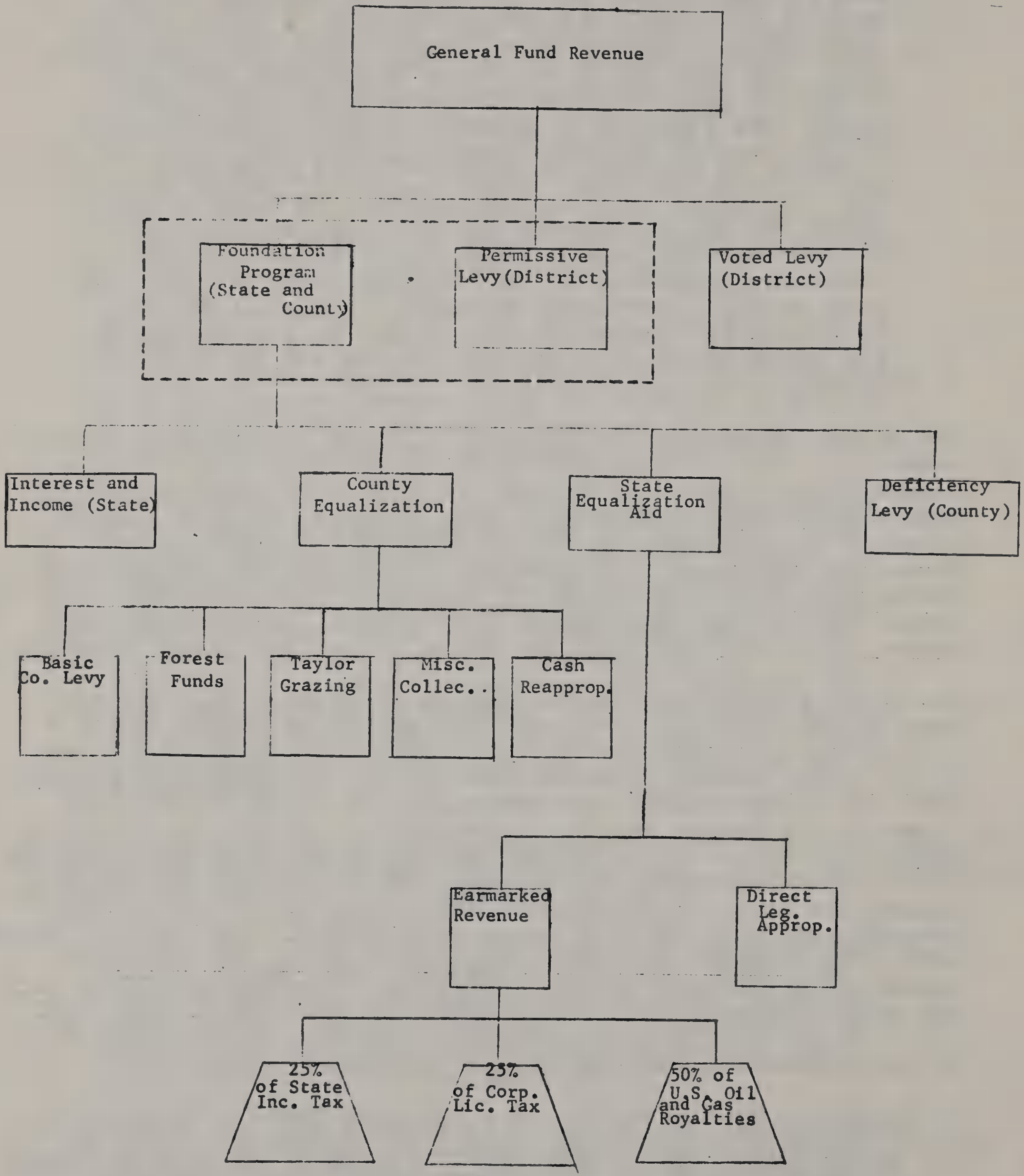
The primary concerns articulated in these provisions, briefly summarized are (1) that the state insure full support of a public school system; (2) that the source of this support be secure and productive, and(3) that state funding be distributed on an equitable basis. Guided by these provisions, the state has developed a program for financing the public school system composed of three major elements: the interest from the public school fund and income from school lands; county and school district taxation, and state income and other taxation.

The total funding system for public schools in Montana may best be described in the form of diagrams in Tables 8 and 9 indicating the component parts. Beyond the revenues raised by the basic county property tax levies (25 mills for elementary and 15 mills for high schools), the state contributes interest and income monies, earmarked tax funds and direct appropriations to bring school districts up to a basic minimum level--or foundation--of funding. To the degree that this support is still inadequate to maintain a basic educational program, as it is in most cases, the schools must rely on county deficiency levies, district permissive levies and district voted levies to make up the difference. Tables 10 and 11 show the performance of the state foundation program between 1961 and 1971. Table 12 shows the variation in the composite funds in the foundation program during the same period.

As indicated by the tables, the existing foundation program still leaves a preponderant burden for school financing on the local level; on the average more than 70 percent of school funding derives from local sources. More than 30 per cent of this funding over the past ten years has come from district

TABLE 8

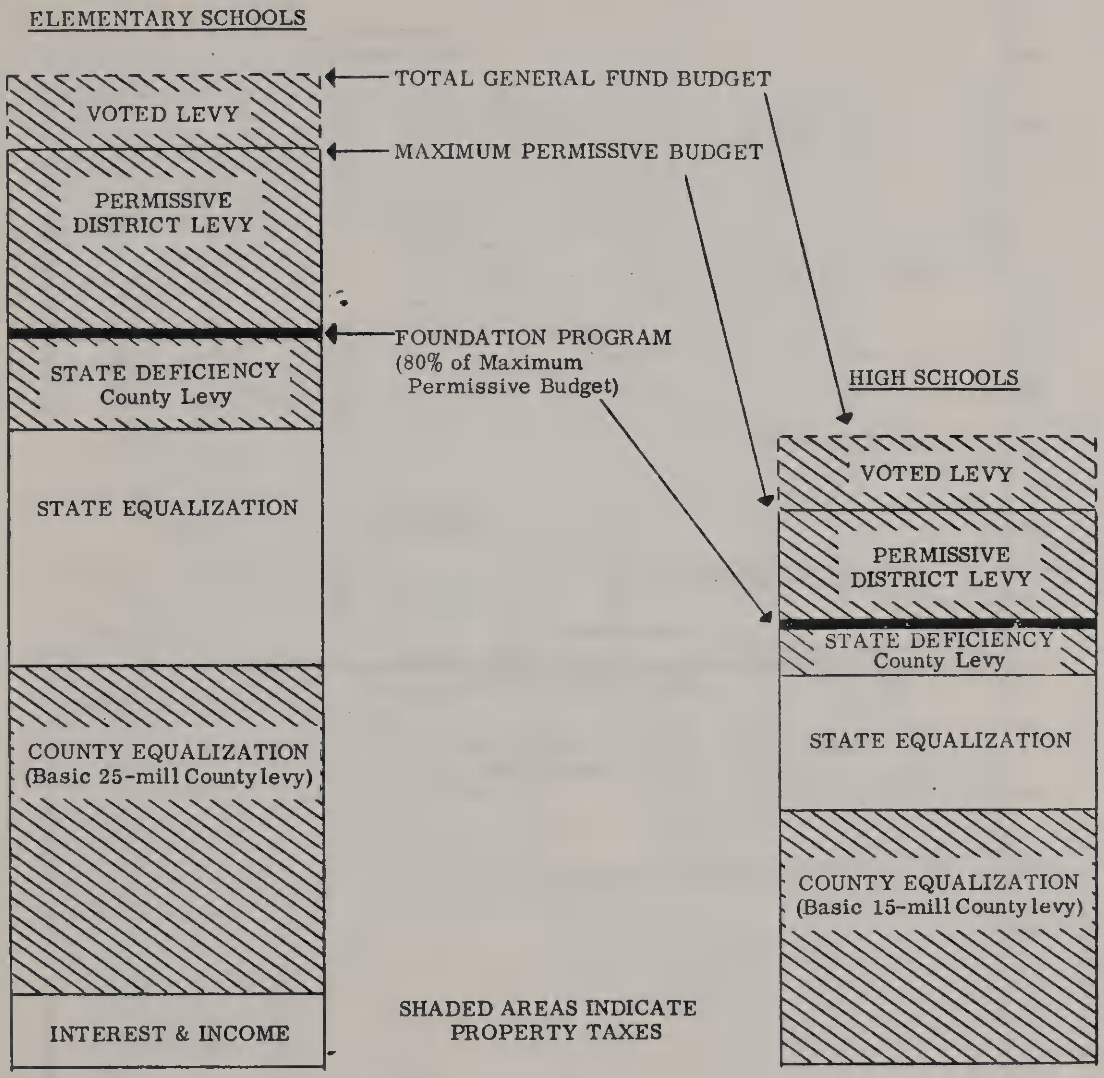
SOURCES OF REVENUE FOR SCHOOL DISTRICT GENERAL FUND BUDGET SUPPORT



Source: A Study of Basic Educational Funding, Methodology in Montana; January 1972, (Working Draft) Dolores Colburg, Office of Superintendent of Public Instruction.

TABLE 9

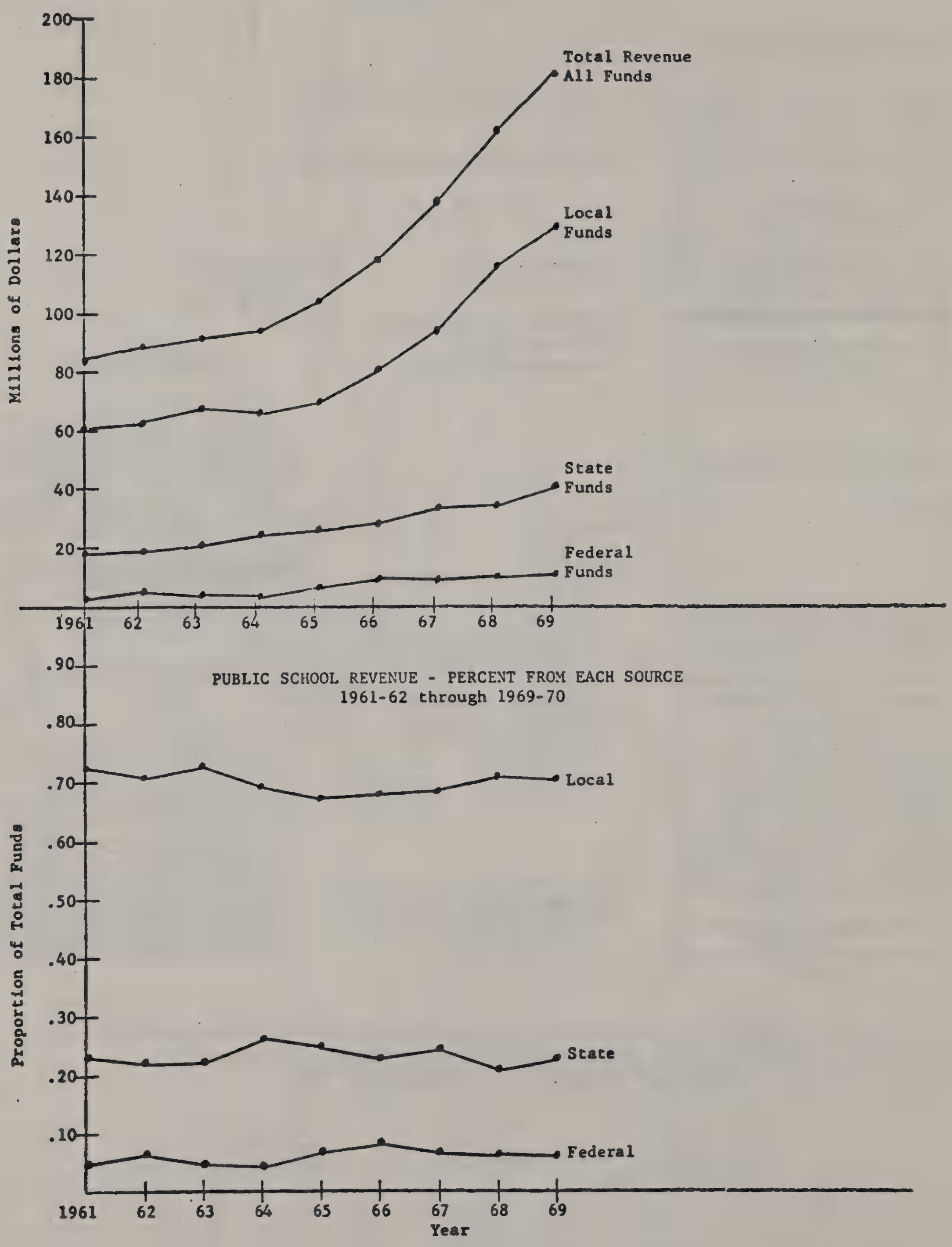
SCHOOL FINANCING UNDER PROVISIONS OF 1969 FOUNDATION PROGRAM LAW


ELEMENTARY SCHOOLS
VOTED LEVY
TOTAL GENERAL FUND BUDGET
MAXIMUM PERMISSIVE BUDGET
PERMISSIVE DISTRICT LEVY
FOUNDATION PROGRAM (80% of Maximum Permissive Budget)
STATE DEFICIENCY County Levy
HIGH SCHOOLS
VOTED LEVY
PERMISSIVE DISTRICT LEVY
STATE DEFICIENCY County Levy
STATE EQUALIZATION
STATE EQUALIZATION
COUNTY EQUALIZATION (Basic 25-mill County levy)
COUNTY EQUALIZATION (Basic 15-mill County levy)
INTEREST & INCOME
SHADED AREAS INDICATE PROPERTY TAXES

Source: Here's How! (it works), Montana Education Association, Helena, Montana, 1970. p. 8.

TABLE 10

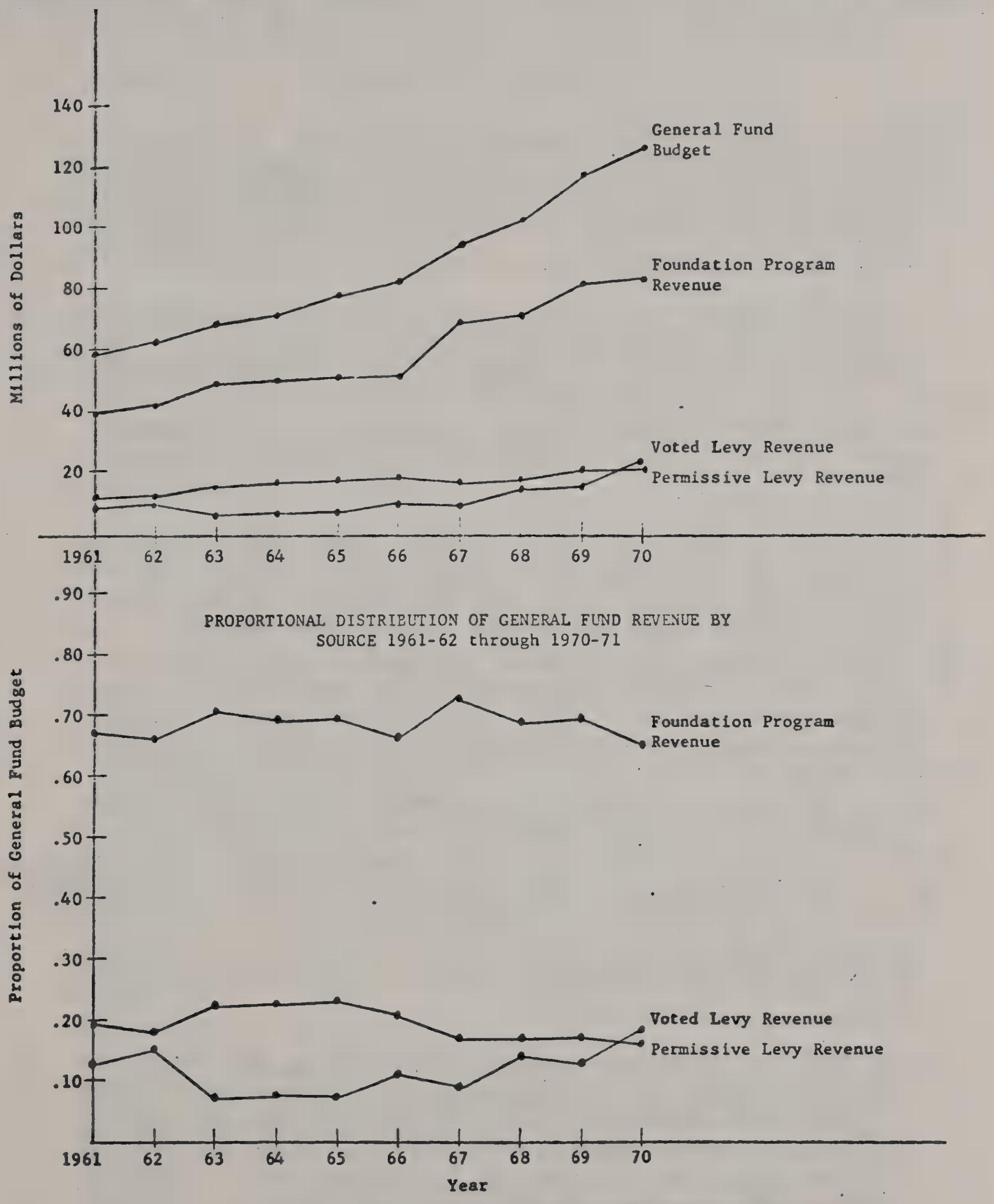
PUBLIC SCHOOL REVENUE - AMOUNT FROM EACH SOURCE
1961-62 through 1969-70



Source: Annual Report of the Office of Superintendent of Public Instruction, 1970-71.

TABLE 11

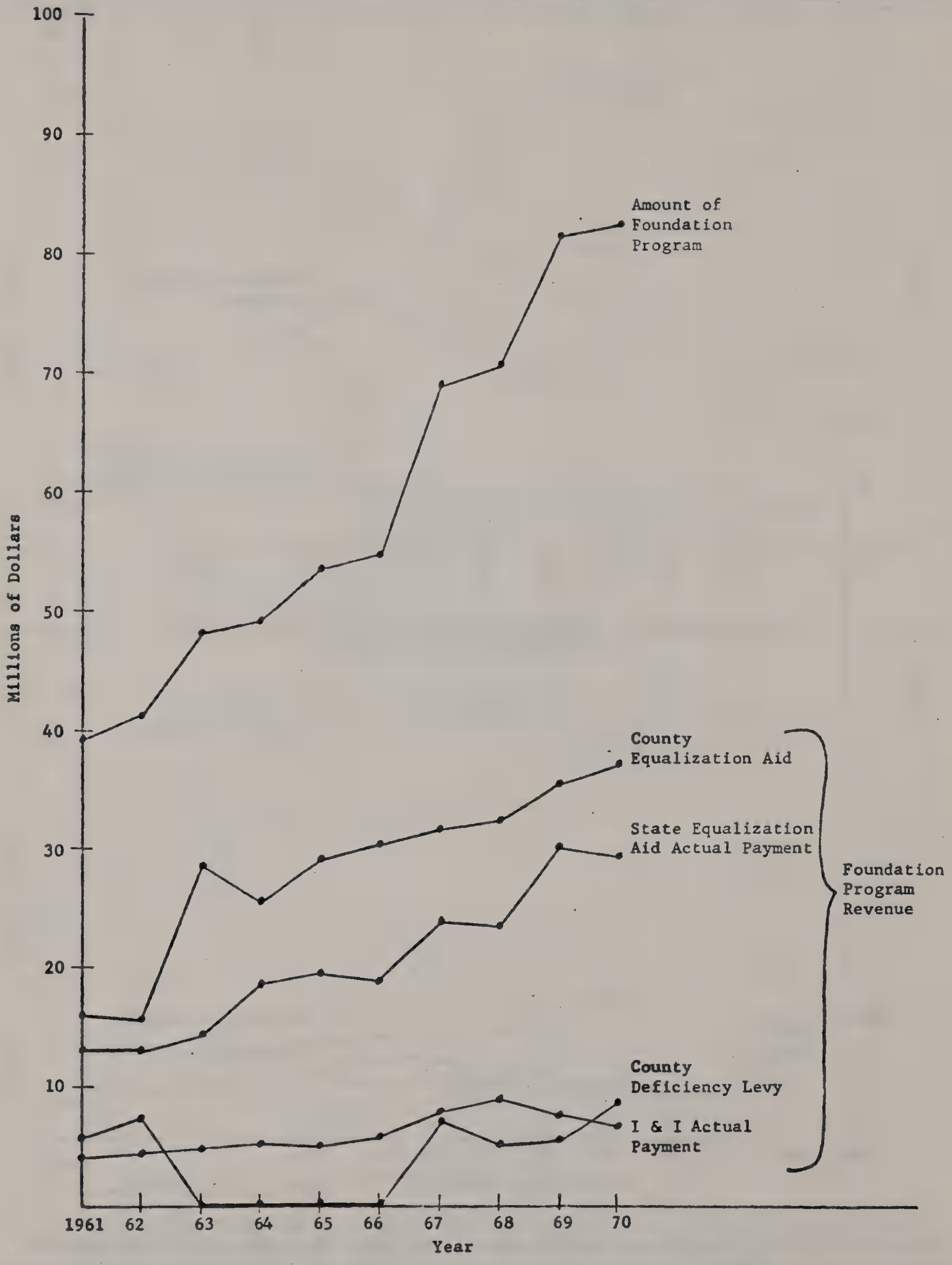
PUBLIC SCHOOL REVENUE - AMOUNT FROM EACH SOURCE 1961-62 through 1969-70



Source: Annual Report of the Office of Superintendent of Public Instruction, 1970-71.

TABLE 12

FOUNDATION PROGRAM AMOUNTS AND FUNDING REVENUE BY SOURCE 1961-62 through 1970-71



Source: Annual Report of the Office of Superintendent of Public Instruction, 1970-71.

taxes levied above and beyond the foundation program support. Local wealth thus remains a major factor in school financing. Table 13 provides a graphic illustration of the large disparities in per pupil expenditures and tax burdens in a sample of wealthy, average and poor Montana school districts.

A recent study of the foundation program concluded:

1. As district wealth increases, the per pupil general fund expenditure increases, indicating that wealthy districts tend to spend more per pupil than poor districts. (The correlation coefficient between district wealth and per pupil expenditure is .365.)

2. As wealth increases, the amount of state aid per pupil received by the district tends to increase. The correlation coefficient is .130 which, though small, is nevertheless significantly positive. This indicates that the goal of providing state aid in inverse proportion to district wealth is not being realized in Montana.

   In fact, the data strongly suggest that, at least for elementary districts, the opposite is true (this trend was not observed for high school districts - see Section IV); i.e., the wealthier elementary districts are receiving more state funds on a per pupil basis than the poorer districts. This is partially explainable by the fact that many of the disproportionately wealthy districts are small, enrollment-wise, and the foundation program for very small schools is disproportionately large on a per pupil basis. However, a more important factor here is that school districts, irrespective of their wealth, receive interest and income money on a per census child basis, even though the entire foundation program portion of the general fund budget can be financed entirely out of the basic county 25 mill levy.

3. As district wealth increases, the size of the district levy required to support the general fund budget tends to decrease. The correlation coefficient is - .307.) Furthermore, as wealth increases, the amount of district funds per pupil (raised by the district levy) tends to increase (correlation coefficient = .141).

4. As district wealth increases, the county property tax levy (basic levy + deficiency levy) required for

TABLE 13

COMPARISON OF DISTRICT'S ABILITIES TO PROVIDE VARIOUS LEVELS OF FISCAL EFFORT IN TERMS OF PER PUPIL GENERAL FUND EXPENDITURES - ELEMENTARY SCHOOLS

County	Dist. No.	ANB	Per Pupil Expenditures	District Contribution	Dist. Levy Req. (mills)	State Contribution	Tax. Val. Per ANB
Ravalli	15-6	298	$ 471	$ 94	27.25	$ 199	$ 3,461
Powder River	22	75	$1030	$560	3.35	$ 49	$167,449
Cascade	95	3	$2470	$444	2.17	$1374	$205,219
Flathead	50	768	$ 503	$ 97	37.22	$ 213	$ 2,628
Golden Valley	41-M	35	$1180	$492	10.40	$ 89	$ 47,377
Jefferson	5	29	$ 970	$443	51.95	$ 221	$ 8,541
Musselshell	9	28	$1353	$652	17.86	$ 189	$ 36,544

Source: A Study of Basic Educational Funding, Methodology in Montana; January 1972, (Working Draft) Dolores Colburg, Office of Superintendent of Public Instruction.

support of the foundation program (and thus, the general fund budget) tends to decrease. (The correlation coefficient is - .211.) Furthermore, wealthier districts tend to receive more county funds per pupil than poorer districts. (Correlation coefficient = .281).

5. *As district wealth increases the total property tax levy (county levy + district levy) tends to decrease* (correlation coefficient = - .322) [emphasis added].

In addition, the following results are worthy of comment.

6. Although nearly 18% of the state's total property taxable valuation is located in elementary districts which have individual wealth in excess of $15,000 per pupil, less than 3% of the state's elementary pupils reside in those districts.

7. Although the average district levy in the state was 13.2 mills, 88.5% of the pupils in the state reside in the districts which had district levies in excess of 19 mills, and less than 68% of the state total taxable valuation was located in these districts. Further, the average of the district general fund expenditures for these districts was less than $600 per pupil compared to the average district expenditure of $799 for the state as a whole.

8. Finally, it might reasonably be asked if it is possible that school district per pupil expenditures are more strongly dependent on school size than on district wealth, so that the positive correlation observed between wealth and expenditures actually results from the fact that many of the smaller districts are also among the wealthier in the state. To evaluate this possibility, per pupil expenditures were correlated with district wealth for each of two school size categories....

   [The] results indicate that even for districts of the same size, the per pupil general fund expenditure tends to increase as district wealth increases. The results, therefore, tend to refute a hypothesis that the positive correlation between wealth ad per pupil expenditure is actually due to a more basic relationship between school size and per pupil expenditure. (Essentially the same results were observed for high school districts; these are described in Section IV).[14]

Another indication of inequalities inherent in the Montana school financing system is Montana's place in a ranking of the states on the basis of relative equalization. The National Educational Finance Project has developed an "equalization score" for the school financing programs of all fifty states. Several factors are combined in the composite score, such as differences among rich and poor districts and the degree of state versus local financing. As shown in Table 14, Montana ranks thirtieth among the states in its equalization score. This places it below California and Texas, two of the states in which the courts have declared the present financing system to be inviolation of equal protection rights guaranteed under the Fourteenth Amendment.

Such evidence together with total revenue considerations suggest a possible need for change in the existing methods of collecting and distributing funds to the Montana school system. Almost any major change, however, would require some modification of the extensive provisions in the present Constitution which govern school financing. Since the constitutional alternatives depend to some degree on the kind of system envisaged, a brief discussion of major alternatives in school financing systems, and a summary of possible constitutional choices follows.

ALTERNATIVE SCHOOL FINANCING SYSTEMS

The National Educational Finance Project suggests five major goals which a state educational finance program should accomplish:

1. Provide local school systems a level of support for an educational program commensurate with the relative financial ability of the state.

2. Include provisions for innovation and improvement in instructional programs.

3. Include provisions for the identification and evaluation of alternative methods of accomplishing educational objectives.

4. Provide a system for local districts to develop program and financial data which permit accountability to the public.

5. Substantially equalize educational opportunity throughout the state.[15]

Clearly, no system yet devised will fully meet all these goals at once. However, a number of systems have been developed or suggested which make major advances toward their attainment.

TABLE 14

RANKING AND EQUALIZATION SCORES OF THE STATES BASED ON THE NEFP TYPOLOGY FOR THE SCHOOL YEAR, 1968-69

Rank	*State*	*Score*	*Rank*	*State*	*Score*
1	Hawaii	8.400	26	Maryland	5.092
2	Utah	7.143	27	Virginia	5.085
3	Rhode Island	6.862	28	Texas	4.963
4	Alaska	6.628	29	California	4.841
5	Wyoming	6.543	30	Montana	4.810
6	Washington	6.368	31	Maine	4.804
7	Idaho	6.318	32	Nevada	4.779
8	Alabama	6.220	33	Massachusetts	4.536
9	Delaware	6.202	34	Oregon	4.535
10	North Carolina	6.148	35	Tennessee	4.521
11	Georgia	6.103	36	Minnesota	4.433
12	Kentucky	6.042	37	Arizona	4.355
13	Florida	5.995	38	Iowa	4.042
14	New York	5.957	39	North Dakota	3.931
15	Louisiana	5.929	40	Missouri	3.852
16	New Mexico	5.915	41	Michigan	3.844
17	Ohio	5.882	42	Kansas	3.820
18	Pennsylvania	5.870	43	New Jersey	3.754
19	Vermont	5.834	44	Indiana	3.704
20	Wisconsin	5.781	45	Oklahoma	3.691
21	Mississippi	5.744	46	Arkansas	3.647
22	West Virginia	5.578	47	Colorado	3,571
23	Illinois	5.398	48	South Dakota	3.420
24	Nebraska	5.378	49	New Hampshire	3.091
25	South Carolina	5.235	50	Connecticut	2.295

Source: National Educational Finance Project. Alternative Programs For Financing Education. Volume 5, Gainesville, Florida, p. 74-75, 1971.

FINANCING EDUCATION

The following state financing schemes are directed toward the maximization of some or all of the goals of adequate support, educational diversity, local control and equalization of tax burden and distribution of funds.

Types of Systems

One author describes educational financing systems in terms of three major types--flat grant, foundation plan and percentage equalizing:

> The typical flat grant is a fixed annual payment to the district, based on the average number of pupils in daily attendance. This may have some equalizing effect since a dollar given to both a wealthy and poor district does reduce the proportionate disparity between them. But the size of the flat grant is often so small in relation to even the poorest district's total expenditures, and the disparity among districts so great, that the equalizing effect is trivial at best.
>
> Under a foundation plan the state determines a uniform "adequate" offering and a reasonable minimum tax effort that a district should make to finance its schools. The state makes up any difference between the foundation amount and the revenues raised by the minimum tax effort. Suppose, for example, that a state sets its foundation program level at $300 and requires a minimum participation effort of one percent. In a district with an assessed value per pupil of $20,000, a one percent tax would yield $200 per pupil, and the district would receive a state subvention of $100 per pupil. If the district made a greater tax effort, say two percent, it would receive the $100 state assistance, plus the additional local tax revenues of $200, and it would therefore spend $500 per pupil.
>
> The foundation program equalizes, but only to a point. Suppose that another district in this hypothetical system has an assessed value per pupil of $60,000. A one percent effort in this district produces an offering of $600, or twice the amount of the foundation guarantee. The higher the state establishes the "adequate" offering, the more its foundation program tend to equalize. But even if the program matches what the wealthiest district would raise at the minimum effort, as soon as that district makes more than the minimum effort wealth-determined disparities reappear.

> Under an ideal percentage equalizing system, each district that makes the same tax effort is able to spend an equal amount per pupil regardless of the district's wealth. Effort and expenditure vary directly with one another, so that efforts of 1, 2, and 3 percent would yield respective offerings of, say, $300, $600 and $900. The state accomplishes this by paying the difference between revenues raised at a given tax rate and the offering set for that rate. The proportion paid by the state is thus inversely related to a district's wealth. The percentage equalizing plan could be fully equalizing if a state incorporated the effort-expenditure relationship of its wealthiest district. The state would pay each district that made a given tax effort the difference between what it raised and what the wealthiest district would raise with the same effort. For a variety of reasons, none of the state plans in actual operation is fully equalizing. A state may choose to equalize only up to the level of some district below the wealthiest (for example, the district of average wealth), it may impose a percentage or dollar limit on the state subsidy; or it may guarantee to pay a certain proportion of each district's costs regardless of the ratio produced by the formula (a variation of the flat grant). [Citations omitted].[16]

Particular Financing Plans

Numerous actual and theoretical educational finance plans are described by analysts. The more important of these are:

1. Flat Grant--Uniform Flat Grants Allocated to all District Regardless of Local Taxable Wealth and Amount of Local Taxes.

> The state revenue is allocated on the basis of a flat amount per child or per teacher or some other method that does not take into consideration either the variation in educational needs of the student population or the variation in the taxpaying ability of the local districts. This type of grant may be either general or special purpose.

2. Flat Grant--Variable Flat Grants Allocated to all Districts Regardless of Wealth.

> This is a more sophisticated type of flat grant which is allocated on a similar method to the uniform flat grant. However, the units such as pupil or teacher units are weighted according to variations in costs due to factors

beyond the control of the boards of education. For example, unit costs may vary due to grade level, type of educational program, sparsity, etc. This type of grant also may be utilized in the form of general or special purpose.[17]

3. Foundation Program--Strayer-Haig Formula-Unweighted Measures of Need. Educational needs are calculated in terms of a uniform amount per pupil or per teacher or some other method that ignores the variation of educational needs of the student population and the yield of a required local tax effort in proportion to ability is deducted from the designated cost of the program in order to determine the state allocation.

4. Foundation Program--Strayer-Haig Formula-Weighted Measures of Need. Educational needs are calculated in terms of weighted unit costs such as weighted pupils or adjusted instruction units which take into consideration necessary unit cost variations, and the yield of a required local tax effort in proportion to ability is deducted from the designated cost of the program, in order to determine the state allocation.[18]

5. Power Equalizing. Under power equalizing a district's offering a solely a function of its tax effort. Every district that makes an effort of A percent may expend M dollars; B percent, N dollars, and so on. If a given effort in fact yields less than the established corresponding offering, the state makes up the difference. If the effort produces more than the offering, the district must pay over any excess to the state. Power equalizing is a more generalized principle than percentage equalizing in that the state's proportionate share of a district's revenues need not remain constant at every effort level. Thus, the effort-offering formula can be designed to encourage or discourage particular levels of expenditure. [Citations omitted][19]

6. Voucher System or Family Power Equalizing--If the "power equalizing" principle is transferred from the school district to the family, the result is what has been described by many as the voucher system. Under this system an individual family could choose the school its children would attend, according to where it desired to spend an education voucher supplied by the state. In one version of the system, proposed by Coons and Sugarman, the parents also would contribute a graduated amount according to wealth to pay for the voucher and thus receive benefits corresponding to degrees of effort.

One author lists five major versions of the voucher mode of financing:

> (1) the free market version proposed by Milton Friedman; (2) the sliding-scale version, which sets the voucher value inversely to family income, discussed by Dean Theodore Sizer and Philip Whitten; (3) the "effort" model developed by John Coons; (4) the "open schools" plan of James Coleman; and (5) the regulated model developed by Christopher Jencks and his colleagues at the Center for the Study of Public Policy.[20]

In general, the merits claimed for the voucher system are the competitive incentive for better and more efficient schools, stressed by conservative economist Milton Friedman; the equality of opportunity inherent in the system, emphasized by John Coons and Christopher Jencks, and the enhancement of educational diversity, stressed by Judith Areen.

7. State-wide Financing--General Property Tax--Most of the above plans, because of their equalizing nature, place the primary or sole responsibility on the state as the source of funds. One principle way to transfer the supply of revenue from the locality to the state is to have the state assume the administration of a statewide property tax. Under such a system every property owner in a state would be taxed uniformly and the funds would be distributed by the state according to one of the above plans. Such a system would eliminate the large disparities in property taxation and would establish a uniform system of assessment.

8. Combined Property and Income Tax--To alleviate some of the difficulties of the property tax--namely its relative inelasticity and regressive character--one Montana state legislator has proposed a combined property and income tax for the support of schools. According to the author, the plan would

> abolish the property tax on habitable dwellings and . . . replace the revenue lost at the local level by taxing the adjusted gross income of all citizens. The rate of taxation would be set in each local taxing district at exactly the percentage needed to replace the lost revenue. It would be the same percentage for everyone, but it would vary from year to year and from county to county just as millages do.[21]

Such a plan would have the advantage of retaining local control over educational financing, while eliminating some of the inequities of local property taxation. However, it would still sustain some of the factors which make education a function of local wealth.

9. District Reorganization--A technique for allocating the burden and benefits of educational support on a more equitable basis while retaining the advantage of local control is that of massive redistricting. This method of modifying school finance can be accomplished either alone or in conjunction with several of the plans mentioned above. If boundaries are redrawn on the basis of districts of approximately equal wealth per school child, then the decisions concerning support could be left to local determination without creating inequalities. However, patterns of wealth tend to change and the prospect of school district gerrymandering looms as a potential evil in such a system.

CONSTITUTIONAL ALTERNATIVES

The list of additional systems and variations on them could be extended at length; the above suggest only the great variety possible in school finance schemes which emphasize one or another value. The primary question facing the Constitutional Convention would appear to be whether to include language to promote a particular plan, to provide for school financing in only very general terms, thus allowing for a variety of systems, or to indicate a general direction for finance programs by specifying broad guidelines to the legislature.

These general alternatives can be framed in terms of the following specific possible courses of action. The Convention could:

1. Retain all the existing provisions on educational finance, thus leaving the present system unchanged (unless required to change by court decision).

2. Revise only those provisions dealing with taxation for education (Art. XI, Sec. 6, Art. XII, Secs. 1a and 9) to provide for taxation primarily at the state level or for other restructuring of tax support.

3. Revise only those provisions dealing with the "public school fund" and the interest and income therefrom (Art. XI, Secs. 2,3, 4 and 5) to allow for other management and investment techniques, e.g., modifying the structure of the land board, changing the percentage of the monies reinvested for capital improvement, removing investment restrictions, and so on.

4. Revise only the provisions dealing with the distribution of school funds (Art. XI, Secs. 5 and 6) to provide for greater equalization of educational support.

5. Combine any or all of alternatives 2,3, and 4 to provide programs which allow greater flexibility in both taxation and distribution programs.

6. Substitute for all of the existing sections on educational finance a general provision establishing state responsibility and indicating the general thrust of educational financing in the state, e.g., state rather than local financing of schools. This would provide substantial flexibility while supplying broad guidelines to the legislature.

7. Eliminate all provisions on educational financing, thus leaving the question entirely to the legislature.

CHAPTER IX

NOTES

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2. Walter W. Heller, "Education as an Instrument of Economic Policy," Address delivered before the O.E.C.D. Policy Conference on Economic Growth and Investment in Education, Washington, D.C., Oct. 18, 1961, mimeo, p. 4.

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5. Theodore W. Schultz, "Reflections on Investment in Man," *The Journal of Political Economy, Supplement 70* (Chicago: University of Chicago Press, 1962), p. 5.

6. Joint Economic Committee, U.S. Congress, *Analysis of Rising Costs of Public Education*, Study Paper No. 4 (Washington, D.C.: Government Printing Office, 1959), p. 33.

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11. Garvue, *Modern Finance*, p. 175.

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13. *Ibid*., p. 9.

14. Dolores Colburg, *A Study of Basic Educational Program Funding Methodology in Montana: Part 1* (Helena: Office of the Superintendent of Public Instruction, 1972), Working Draft, unnumbered.

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15. National Educational Finance Project, Alternative Programs for Financing Education, Vol. 5 (Gainesville, Florida, 1971, p. 232. Cited hereafter as NEFP, Alternative Programs.

16. Paul A. Brest, "Interdistrict Disparities in Educational Resources," Stanford Law Review 23 (1971): 593-94. Cited hereafter as Brest, "Interdistrict Disparities."

17. NEFP, Alternative Programs, pp. 235-236.

18. Ibid., pp. 236-237.

19. Brest, "Interdistrict Disparities," pp. 594-95.

20. Judith Areen, "Education Vouchers," Harvard Civil Rights Review, 6 (1971): 470.

21. Robert D. Watt, "Let's Abolish Property Taxes!" The American County (April, 1970).